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Sessional Paper

on

The Power of Mercy Policy Framework

February, 2024

The Power of Mercy Advisory Committee

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TABLE OF CONTENTS

| | |
|---|-------------|
| LIST OF STATUTES AND OTHER LEGAL INSTRUMENTS | vii |
| LIST OF ACRONYMS, TITLES AND ABBREVIATIONS | ix |
| FOREWORD | xi |
| ACKNOWLEDGEMENT | xiii |
| EXECUTIVE SUMMARY | xv |
| 1.0 CHAPTER ONE | 1 |
| 1.1 BACKGROUND | 1 |
| 1.2 Policy Objectives..... | 4 |
| 1.3 Core Values | 5 |
| 1.4 Guiding Principles..... | 5 |
| 2.0 CHAPTER TWO | 6 |
| 2.1 SITUATIONAL ANALYSIS OF THE POWER OF MERCY | 6 |
| 2.1.1 Introduction | 6 |
| 2.1.2 Legislative Framework..... | 6 |
| 2.2 NATIONAL LAW AND POLICY RELEVANT TO THE POWER OF MERCY | 7 |
| 2.3 SYSTEMIC CHALLENGES IN THE ADMINISTRATION OF POWER OF MERCY | 13 |
| 3.0 CHAPTER THREE..... | 22 |
| 3.1 STRATEGIES FOR IMPLEMENTATION OF THE POWER OF MERCY IN KENYA..... | 22 |
| 3.2.1 FREE PARDON..... | 22 |
| 3.2.2 CONDITIONAL PARDON..... | 23 |
| 3.3 SEALING OF CRIMINAL RECORDS..... | 23 |
| 3.4 POSTPONING OF THE CARRYING OUT OF A PUNISHMENT | 24 |
| 3.5 SUBSTITUTING A LESS SEVERE FORM OF PUNISHMENT | 24 |
| 3.5 REMISSION OF ALL OR PART OF A PUNISHMENT | 24 |
| 3.6.1 Types of Remission..... | 25 |
| 3.6.2. Revocation of remission..... | 25 |

| | |
|--|-----------|
| 3.6 PRISON BASED PETITIONS SUB – COMMITTEES | 25 |
| 3.8 SUPERVISION AND MONITORING | 26 |
| 3.9 RESETTLEMENT AND REINTEGRATION SUPPORT..... | 26 |
| 3.10 COUNTY MULTI-AGENCY PETITIONS COMMITTEES | 26 |
| 3.11 VICTIM PARTICIPATION | 27 |
| 3.13 NON-CITIZEN OFFENDERS | 27 |
| 3.14 PARDON WARRANT | 28 |
| 4.0 CHAPTER FOUR | 29 |
| 4.1 POLICY CO-ORDINATION AND IMPLEMENTATION FRAMEWORK..... | 29 |
| 4.1.1. Introduction | 29 |
| 4.1.2. Policy objectives: | 29 |
| 4.1.3. Policy statements..... | 29 |
| 4.2 INSTITUTIONAL LINKAGES OF THE POWER OF MERCY | 29 |
| 4.3. Duty to Cooperate | 33 |
| 5.0 CHAPTER FIVE | 34 |
| 5.1 MONITORING AND EVALUATION | 34 |
| 6.0 CHAPTER SIX..... | 35 |
| 6.1 RECCOMENDATIONS | 35 |

LIST OF STATUTES AND OTHER LEGAL INSTRUMENTS

(i) Kenya

Constitution of Kenya, 2010

Borstal Institutions Act (Cap. 92)

Children Act, 2001

Community Service Orders Act, 1998

Criminal Procedure Code (Cap. 75)

Judicial Service Act (Cap. 185B)

Mental Health Act (Cap. 248)

National Government Co-ordination Act, 2013

National Police Service Act (No. 11A of 2011)

Penal Code (Cap. 63)

Power of Mercy Act, 2011

Prisons Act (Cap. 90)

Prisons Rules, 1963

Probation of Offenders Act (Cap. 64)

Transfer of Prisoners Act, 2015

Victim Protection Act, 2014

Witness Protection Act (No. 16 of 2006)

(ii) Regional Instruments

Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa

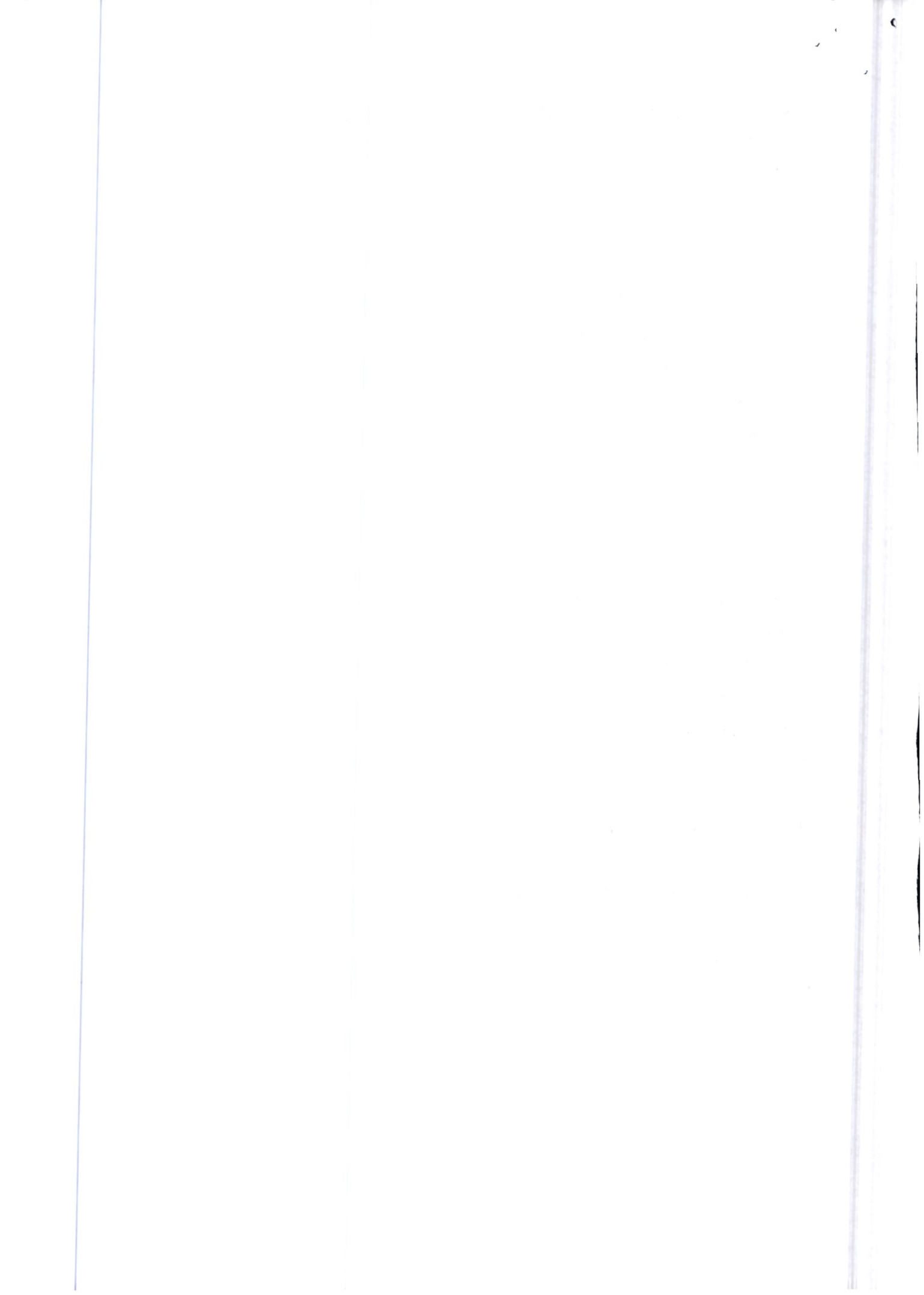
(iii) International Instruments

United Nations Standard Minimum Rules for Non-custodial Measures

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

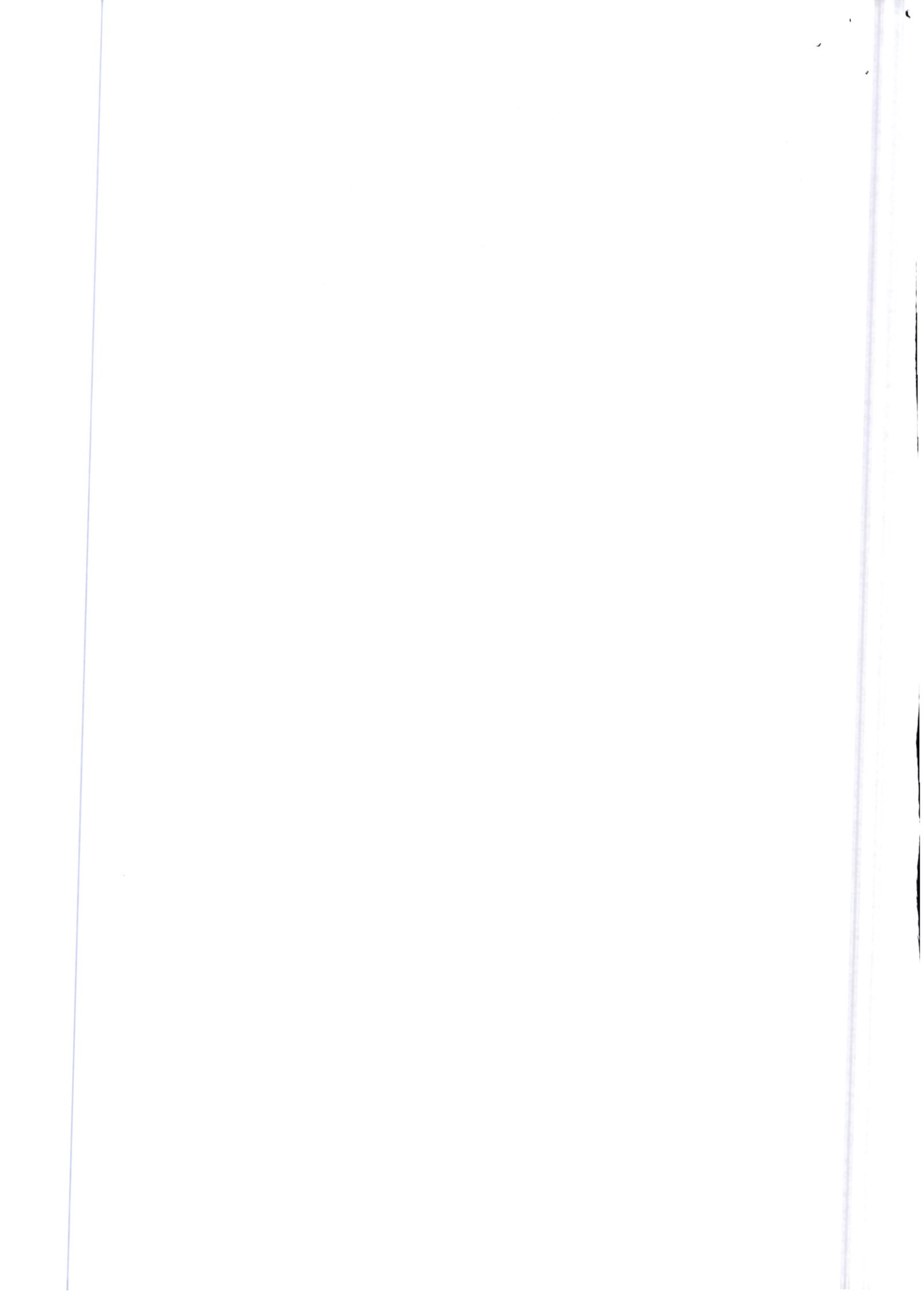
United Nations Standard Minimum Rules for the Treatment of Prisoners

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders



LIST OF ACRONYMS, TITLES AND ABBREVIATIONS

| | |
|----------------|--|
| COK2010 | Constitution of Kenya, 2010 |
| DCI | Directorate of Criminal Investigations |
| MHORC | Mental Health Offenders Review Committee |
| PACS | Probation and After Care Services |
| POMAC | Power of Mercy Advisory Committee |
| CRO | Conditional Remission Order |



FOREWORD

I am pleased to be associated with the Policy on the Exercise of the Power of Mercy. This Policy provides comprehensively the four reliefs of mercy that may be exercised by His Excellency the President pursuant to Article 133 of the Constitution of Kenya, 2010. In doing this, the Policy provides for the circumstances when each relief of mercy may be granted and the effect of each reprieve. This has brought much needed clarity, certainty and predictability on the substantive and procedural aspects of the mercy process.

In response to the Constitutional demands for transparency, accountability, inclusiveness and participation, the Policy has provided for the digitization of the petition process hence ensuring transparency and ease of access to the Power of Mercy Advisory Committee (POMAC) by petitioners, key stakeholders and the general public. The Policy has also provided measures for fostering accountability, which include supervision of pardoned offenders and provisions on recall where there is breach of conditions of release. In addition, the Policy is sensitive to the impact early release of offenders may have on their victims and expressly provides for the participation of victims in the mercy process. Inclusiveness has also been achieved by not only considering the early release of rehabilitated offenders generally but taking cognizance of offenders rendered vulnerable by their physical conditions, mental health, advanced age or other factors that may necessitate special consideration. The developers of this Policy have demonstrated a clear understanding of the competing interests of offenders, their victims and the public at large. I am delighted to see the delicate balance acquired through years of processing petitions for mercy, lessons learned from post release monitoring programs, engagement with stakeholders and benchmarking with other jurisdictions.

A very progressive approach has also been taken with regard to supporting pardoned offenders. First, to address the issue of unemployment, it has been recommended that the criminal records of reformed offenders be sealed to enable them obtain clean police clearances. This is a step in the right direction as the youth, who are the majority offenders, will get a chance of accessing gainful employment and minimize their propensity of returning to crime as a way of earning a livelihood.

Secondly, provision has been made for resettlement and reintegration of pardoned offenders which will be supported by County Multi Agency Petitions Committees. The benefits of successful reintegration of released offenders cannot be overemphasized as it will ease the offenders' transition back to independent living and reduce chances of recidivism. I commend the holistic approach taken in this Policy as it succinctly provides for the pre-pardon, pardon and post-pardon stages.

I appreciate POMAC for identifying the gaps and systemic challenges in the mercy process and leading the development of policy recommendations aimed at resolving the identified issues. I encourage Agencies at both levels of government to support POMAC in the implementation of the proposals contained herein.

Finally, I sincerely thank all the individuals and institutions who gave their input at different stages of the development of this Policy. Your contribution has in no doubt enriched the contents of this Policy and your participation in the betterment of the mercy process is greatly appreciated.

HON. J.B.N. Muturi, E.G.H.,

Attorney General and Chairperson

The Power of Mercy Advisory Committee



ACKNOWLEDGEMENT

The Committee would like to express its profound gratitude to the following individuals and institutions that supported the formulation of this policy.

The Committee expresses its sincere appreciation to the Office of the Attorney-General for constituting the Taskforce on the Review of the Laws Relating to the Exercise of the Power of Mercy Under Article 133 of the Constitution of Kenya and for entrusting and also supporting the Committee to undertake this rigorous exercise which is a clear demonstration of the commitment to bring reforms to the Criminal Justice Sector.

The Committee would also like to express its deepest appreciation to the Members of the Taskforce whose membership comprised of Office of the Attorney-General and Department of Justice, Office of the Director of Public Prosecutions, Kenya Prisons Service, Kenya Law Reform Commission, National Police Service, Ministry of Health, State Department for Correctional Services, Kenya National Commission on Human Rights, Ministry of Defence, Victim Protection Board, Probation and Aftercare Service, the National Crime Research Centre, National Committee on Community Service Orders and Ministry of Foreign Affairs.

We are indebted to the Executive Office of the President for providing administrative and financial support to the Committee, Principal Secretary, State Department, Internal Security and national Administration and the National Government Administrative Officers who played a crucial role during the course of developing this policy. We also appreciate the POMAC Secretariat Staff who worked tirelessly during the course of formulating this policy. Similarly, we are grateful for the immense technical support provided by the technical experts that were engaged during the development of the policy.

A special thank you to all stakeholders that provided feedback and shared information that contributed to development of this policy. The committee is also immensely indebted to the members of the public for their enriching contribution during the Public Participation forums that were conducted by the Taskforce.

Finally, we are grateful for input provided by various national government institutions including: the Treasury and Cabinet Affairs Office who provided logistical support, Others who offered immense input include representatives from various county governments, members of the public, experts, civil society, the private sector, religious sector and all institutions and individuals, including offenders, who presented memoranda during the course of developing this policy.



EXECUTIVE SUMMARY

The mandate of the Power of Mercy was provided for under section 27, 28 and 29 of the retired Constitution of Kenya, 1963 which was implemented pursuant to various laws which have not been amended to accord to provisions of Article 133 of the Constitution of Kenya, 2010. This led to gaps and challenges of conflicting mandates and overlapping jurisdictions that affected the implementation of the Power of Mercy Advisory Committee's mandate. The Power of Mercy Act, 2011 was also not informed by a policy framework since none existed.

It is in the purview of the above challenges that the Attorney-General vide Gazette Notice No. 7382 of the 25th September, 2020 and Gazette Notice No. 10186 of the 30th November, 2020, established a Taskforce to Review the Laws Relating to the Exercise of the Power of Mercy. The Taskforce term was extended for a further term of one year vide Gazette Notice 9863 of 22nd September 2021.

In undertaking its mandate, the Taskforce held stakeholder consultation meetings in 23 counties between March and May 2021. The stakeholder views received from this engagement together with the research and benchmarking findings were reduced into a Taskforce report that was presented to the Attorney-General on 16th December 2021. From the report it was considered that a power of mercy policy be developed and that repeal of the existing law was necessary due to the extent of new policy decisions.

The Taskforce Report culminated in the development of a Draft Power of Mercy Policy, which was subjected to stakeholder validation between 4th July and 30th September, 2022. The technical committee established to finalize the Power of Mercy Policy has since completed the development of the policy document.

The Policy framework seeks to establish legal, regulatory and institutional frameworks that will guide the implementation of the Power of Mercy in Kenya. The Policy has emphasized the importance of collaboration and partnership and the need to embrace a multi-agency approach. The Policy also seeks to clarify the role of the key stakeholders in order to provide a harmonious framework for the implementation of Article 133 of the Constitution.

The drafting of the policy was informed by a situational analysis, which looked into the legal framework of key stakeholders, their functions and how these were related to the implementation of Article 133. The main challenge identified was the disharmony in existing legislation and inadequacy in legal provisions and policy frameworks leaving gaps that affected the implementation of Article 133.

Other challenges that were noted include; lack of a framework to support resettlement and reintegration of pardoned offenders; lack of a recall clause to revoke pardon for offenders who breach the conditions of their release; lack of budgetary and operational autonomy that has limited the ability of the Committee to fully implement its mandate. Other identified challenges included, systematic issues that affect how the system deals with vulnerable groups including mentally ill offenders; retention of the criminal records of rehabilitated offenders which denies them access to opportunities; stigmatization of reformed offenders and the need for a petition system that is efficient and transparent.

To remedy the identified challenges, this policy proposes several strategies and measures to be adopted in implementing the provisions of Article 133. These include; development of guidelines for the operationalizing and implementing each of the four reliefs provided for under Article 133 of the Constitution, introduction of a new system that allows for the

conditional sealing of the criminal records of reformed offenders; a recall clause to revoke pardon as a consequence for contravening the pardon conditions or upon a specified act; and digitization of the petition process through development of the Electronic Power of Mercy Petitions Management Information System.

The policy framework also proposes other strategies that include; the review of the organizational structure of the Committee in order to provide for operational autonomy for effective and efficient service delivery; establishment of a robust multi-agency system for supervision and monitoring of pardoned offenders; the prioritizing of vulnerable offenders and the development of a framework to facilitate resettlement and reintegration of pardoned offenders. It is envisaged that these measures will result in a conducive policy, legislative and regulatory environment for the administration of the power of mercy in Kenya.

The policy further proposes an implementation structure that expressly defines the roles of the key stakeholders in implementing Article 133 of the Constitution. The policy also provides for a monitoring and evaluation framework that will aid in actualizing the recommended strategies and interventions.

1.0 CHAPTER ONE

1.1 BACKGROUND

Black's Law Dictionary defines the prerogative of mercy as "the discretionary power of a supreme authority, such as a national president or sovereign, to commute a death sentence, change the method of execution, or issue a pardon." The power of mercy has its early origins in ancient Babylonia whereby kings would grant a general discharge from both civil and criminal liabilities, followed centuries later by the ancient Greeks who granted general amnesties and the Romans who exercised several forms of clemency. In medieval Europe, clemency was granted by local authorities or the church, until the sixteenth century when the prerogative of mercy began to be exercised as the absolute prerogative of the sovereign for three main purposes, given that convicted offenders had no statutory right of appeal against either conviction or sentence:

- 1) to forgive crimes committed by children, the mentally ill or in self-defence;
- 2) to provide for alternatives to incarceration such as forced military service or banishment to the colonies; and
- 3) to erase the legal/societal consequences of a criminal conviction.

The modern prerogative power of mercy is variously referred to as 'clemency' and as 'pardon' generally, and is ultimately exercised by the Executive branch of government in the form of a President or Prime Minister, though the methods or process of decision-making, including involvement of other branches of government, varies by jurisdiction.

Rationale for Power of Mercy

Majority of jurisdictions across the globe provide for the inclusion of powers of mercy for the following reasons—

- (a) Presidential pardons and commutations are useful in promoting the contemporary penal policy which is correction and reformation of criminal offenders which replaced retributive policies which were in place previously. The rationale in this instance is that granting of presidential pardons and commutations to inmates who have shown good behavior encourages others to change their behavior as well.
- (b) The power of mercy may be granted for humanity reasons; pregnancy, insanity and young age are some of the factors that merit consideration of clemency for humanity reasons. The Head of State may also pardon elderly inmates or terminally ill inmates in order to save their lives.
- (c) There are instances where a person may breach the law in such circumstances that attract public sympathy and people feel compassion on him/her and want him to be released. The Head of State may thus proffer official compassion by waiving the punishment or commuting part of it.
- (d) The power could be advantageously applied to restore public tranquility in the event of insurrection. For instance, if there exists civil disorder or violent confrontations by members of the public who are calling for the release of a certain imprisoned individual, the President can release him by virtue of powers of mercy in order to restore public order and peace. In a way it equips the government to be able to handle the unexpected contingencies of politics and public administration.

- (e) The power of mercy may be used to maintain or repair diplomatic relations between one country and another. One country may demand release of its own national incarcerated in one of the prisons of another, the failure of which may lead to disruption of diplomatic relations or even eruption of war.
- (f) The power of mercy affords a Head of State the opportunity to correct mistakes that occur in the course of administration of criminal justice. It is for this reason that Heads of State are granted the constitutional power to grant pardons in many jurisdictions.

Principles Guiding the Exercise of Mercy

The exercise of mercy is largely guided by the following principles:

- (a) The exercise of the power of mercy is concerned solely with the applicant;
- (b) The exercise of the power of mercy is not intended to circumvent other existing legislation;
- (c) The mandate of the judiciary shall be respected;
- (d) The power of mercy should be applied in exceptional circumstances only; and
- (e) The exercise of the power of mercy, by its very nature, should not result in an increased penalty.

1. Power of Mercy in Kenya

Operational Definition of Power of Mercy

For purposes of this policy Power of Mercy refers to:

Policies and actions, including legislative measures that enhance the exercise of the prerogative power vested on the President under Article 133 of the Constitution to grant, on the petition of any person, a power of mercy in accordance with the advice of the Advisory Committee by granting a free or conditional pardon to a person convicted of an offence; postponing the carrying out of a punishment; either for a specified or indefinite period; substituting a less severe form of punishment; or remitting all or part of a punishment

Background of the Power of Mercy in Kenya

The power to grant mercy to convicted offenders in Kenya has long been existent and derives from the colonial government. This power was previously implemented pursuant to section 27 of the Constitution 1963, which vested the President with the power to grant reprieves and pardons for offences. Furthermore, sections 28 and 29 of the Constitution 1963 established an Advisory Committee on the Prerogative of Mercy and vested it with the function of advising the President on the exercise of the power of mercy set out in section 27.

The power of mercy has been exercised from time to time since independence. In 1983, President Moi granted conditional pardon to 597 former air force servicemen and university students who had been charged for plotting to overthrow the government. President Moi also granted reprieve to death row prisoners by postponing the execution of their death sentence indefinitely. In 2003, President Mwai Kibaki commuted 223 death row offenders to life imprisonment, and on 8 August 2009, President Kibaki further commuted another 4,000 death row prisoners to life imprisonment. This was the largest known mass

commutation of condemned prisoners anywhere in the world. In October 2016, President Uhuru Kenyatta exercised the power of mercy to release 101 long-term offenders and 7,000 petty offenders from prison. President Kenyatta also signed orders commuting the death sentences of all 2,747 prisoners (2,655 men and 92 women) who were on death row to terms of life in prison. More recently in June 2022, during the occasion to celebrate the 59th Madaraka Day, President Uhuru Kenyatta pardoned 3,908 inmates who were serving sentences of less than three months.

2. Constitution 2010

Article 133 of the Constitution of Kenya, 2010 provides for the power of mercy to be exercised by the President in accordance with the advice of the Power of Mercy Advisory Committee by granting the following reliefs —

- (a) Granting a free or conditional pardon to a person convicted of an offence;
- (b) Postponing the carrying out of a punishment, either for a specified or indefinite period;
- (c) Substituting a less severe form of punishment; or
- (d) Remitting all or part of a punishment.

The *Power of Mercy Act, 2011* provides the framework for the exercise of the power of mercy.

3. Policy Formulation Process

Since independence, the Power of Mercy was exercised pursuant to various laws which have not been reviewed to align with provisions of Article 133 of the Constitution of Kenya 2010.

In addition, the *Power of Mercy Act, 2011* does not provide a framework for the operationalization of the reliefs provided for in Article 133(1) of the Constitution. It is also important to note that the *Act* was not anchored on a policy framework since none existed.

As a result, this has created jurisdictional overlaps of respective mandates and inconsistencies that have affected the implementation of the Power of Mercy Advisory Committee's mandate. Further, the Committee lacks operational autonomy to give full effect to provisions of Article 133 of the Constitution.

It is on this basis that the Attorney General vide Gazette Notice No. 7382 of the 25th September, 2020 and Gazette Notice No. 10186 of the 30th November, 2020, established a Taskforce to Review the Laws Relating to the Exercise of the Power of Mercy.

The Taskforce drew its membership from the following Agencies:

- (a) Executive Office of the President;
- (b) Ministry of Defence;
- (c) Office of the Attorney-General and Department of Justice;
- (d) Power of Mercy Advisory Committee;
- (e) Kenya Prisons Service;
- (f) Kenya Police Service;

- (g) Probation and Aftercare services;
- (h) Victim Protection Board;
- (i) Director of Medical Services;
- (j) National Crime Research Centre;
- (k) Office of the Director of Public Prosecutions;
- (l) Kenya National Commission on Human Rights; and
- (m) Kenya Law Reform Commission.

The Taskforce also co-opted members from the Ministry of Foreign Affairs and the Community Service Orders Committee.

In undertaking its mandate, the Taskforce established technical committees to review laws related to the exercise of the Power of Mercy as well as held stakeholder consultation meetings in 23 counties between March and May 2021. The stakeholder comments received from this engagement and the research findings and global best practices identified during benchmarking were reduced into a Taskforce report.

The Taskforce report was presented to the Hon. Attorney General on 16th December 2021. The Taskforce recommended comprehensive reforms including repeal of current law due to the extent of new policy decisions.

4. Policy rationale

Efficient and effective service delivery in government needs to be guided by sound policies in all operational areas in line with set mandates. It is envisaged that enactment of the Power of Mercy Policy Framework will greatly contribute towards the accomplishment of the principal mandate of the Committee which is to advise the President in exercising the power of mercy as provided for under Article 133 of the Constitution of Kenya, 2010.

1.2 Policy Objectives

The general objective of this policy is to provide clarity on the reliefs provided; a framework for their implementation; delineate the roles of institutions and key stakeholders relevant to the exercise of the power of mercy; provide for an accountable and transparent petition process in order to give full effect to Article 133 of the Constitution and deliver better outcomes to the Kenyans.

The specific objectives are to—

- (a) To provide clarity on the four distinct and mutually exclusive reliefs provided
- (b) Provide a framework for effective and efficient operationalization of the four reliefs;
- (c) Promote and enhance collaboration and cooperation between all stakeholders involved in the implementation of the power of mercy;
- (d) Set standards and expectations, and provide a mechanism to ensure accountability for the performance of functions by all duty bearers; and
- (e) Provide comprehensive information and sensitize members of the public on the power of mercy.

1.3 Core Values

The institutions, officials and stakeholders provided for in this policy shall as far as practicable seek—

- (a) **Collaboration and co-operation:** Development of strategic partnerships and networks that facilitate exchange of relevant information and co-ordination of activities between all stakeholders.
- (b) **Accountability and transparency:** Emphasis on a high level of accountability and transparency in all processes in the administration of power of mercy.
- (c) **Participation and inclusivity:** All stakeholders will be encouraged to participate in the administration of the power of mercy.
- (d) **Ethical leadership:** Committed leadership adhering to national values to promote and ensure good governance.
- (e) **Ethics and ethical conduct:** Emphasis on doing what is right and just.
- (f) **Constitutionalism and the rule of law:** Compliance with the spirit and letter of the Constitution and other laws of the Republic of Kenya.
- (g) **Responsibility:** Institutions, officials and stakeholders will perform their role without fear or favor.

1.4 Guiding Principles

In recognition of the aspirations of the Government of Kenya and the people of Kenya, this Policy is based on the following principles—

- (a) **compliance with the rule of law through independent, transparent and accountable decision making** within clearly established parameters, including an opportunity for the offender to be heard;
- (b) **processes that respect and protect human rights and social justice** including the dignity of the offender, the right to privacy of the offender, the victim(s) and their families, the right of offenders to be equal before the law and to equal protection and equal benefit of the law, and the right of all persons to be free from discrimination on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth;
- (c) **promotion of access to information by the public** on the processes and outcomes of decision making while at the same time maintaining strict confidentiality of information that may endanger the safety, health or life of any person or involve the unwarranted invasion of the privacy of an individual.

2.0 CHAPTER TWO

2.1 SITUATIONAL ANALYSIS OF THE POWER OF MERCY

2.1.1 Introduction

The existing framework for the exercise and application of the power of mercy is affected by several laws some of which were in force before the Constitution of Kenya 2010, besides policies, administrative guidelines and procedures as well as the norms and values of communities to which beneficiaries of the power of mercy are released.

The Constitution secures the interest of special groups and makes international law part of the law of Kenya. In addition, there are laws and policies that facilitate release of rehabilitated offenders and policies that affect re-integration of released offenders back into society. Multiple challenges arise from this environment.

2.1.2 Legislative Framework

(i) Constitution of Kenya 2010

Article 133 of the Constitution of Kenya, 2010 provides for the power of mercy and established the Power of Mercy Advisory Committee (POMAC) whose primary mandate is to advise the President on the exercise of this power.

The Power of Mercy Act. No 21 of 2011 makes further provisions with respect to the power of mercy by providing for the appointment, tenure of office of the members, the powers and functions of the Power of Mercy Advisory Committee and connected purposes.

The requirements for social justice, integrity, transparency, accountability and non-discrimination provided under Article 10 of the Constitution are applicable at all stages in the exercise of the power of mercy.

(ii) International Law

Article 2(5) of the Constitution of Kenya 2010 makes general rules of international law part of the law of Kenya. Recommendations arising from these rules with a bearing on exercise of the power of mercy have been taken into consideration during the course of developing this policy. The instruments that were reviewed include:

- (a) The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),
- (b) the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) and
- (c) The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa.

2.2 NATIONAL LAWS AND POLICY RELEVANT TO THE POWER OF MERCY

(i) Power of Mercy Act No. 21 of 2011

The Power of Mercy Act 2011 establishes the Power of Mercy Advisory Committee (POMAC) consisting of the Attorney General who is the chairperson of the Committee, the Cabinet Secretary responsible for correctional services and seven other members who possess diverse professional expertise, skills and knowledge and are competitively recruited by a special panel constituted by the President. The primary mandate of the Committee is to advise the President in exercising the power of mercy to eligible petitioners.

The Committee has within its structure the pardon officers who are public officers stationed at correctional facilities and who report directly to the Committee on all matters related to power of mercy including assisting applicants in the preparation of petitions and sensitizing prisoners on the power of mercy. The Committee is supported by a secretariat lead by a Secretary who is a public officer nominated by the Public Service Commission through a competitive process, and appointed by the President. In exercising the power of mercy, the President may:

- (a) Grant a free or conditional pardon to a convicted prisoner;
- (b) Postpone the carrying out of a punishment;
- (c) Substitute a less severe punishment; or
- (d) Remit all or part of the punishment.

Any person who is a convicted criminal prisoner and is not serving a non-custodial sentence (is on probation or serving a suspended sentence) or having a pending court processes can apply for pardon. The convicted criminal prisoner must have served at least a third of the sentence and those on life sentence or death sentence must have served at least five years. The Committee receives petitions for exercise of mercy from convicted offenders, duly consider the same, make recommendations and accordingly advise the President. In assessing the petition for pardon, the Committee considers, amongst other things:

- (a) The age of the convicted criminal prisoner;
- (b) Circumstances, nature and seriousness of the offence;
- (c) Period served by the convicted criminal prisoner;
- (d) Interest of the State or the Community;
- (e) Post-conviction conduct;
- (f) Reports from Kenya Prison Service and Probation and after care Services; and
- (g) Circumstances of the convicted criminal prisoner.

The Committee conducts a thorough review in determining a petitioner's worthiness for pardon. Accordingly, all petitioners are subjected to a detailed inquiry into their personal background and current activities. As stated above, among the factors entering into this determination are: the petitioner's overall criminal record and history prior to conviction, the extent of the offender's post-conviction involvement in rehabilitation programs and other meritorious activities during the period of incarceration. Also considered is the physical state and mental health of the offender. It is these stages of the petition processing that allow the consideration of the offender as legislated by the Power of Mercy Act.

The Committee also considers the views of the victim of the offence committed by the petitioner. Any petitioner may appeal or re-petition only once after rejection and on new grounds to the President through the Power of Mercy Advisory Committee.

The Committee undertakes other functions including undertaking research and collecting data relating to the power of mercy, educating stakeholders and the general public on the power of mercy and carrying out investigations required to make a determination on a petition for power of mercy. In doing so, the Committee has the power to determine its own procedure, to establish sub-committees and co-opt persons whose knowledge and expertise it requires, to conduct interviews of offenders who have petitioned for mercy, and to receive written or oral statements without being bound by the strict rules of evidence.

Challenges

The *Power of Mercy Act, 2011* only substantively addresses the granting of a pardon but does not address any of the other reliefs provided for in Article 133(1) of the Constitution.

It is also important to note that the current *Power of Mercy Act, 2011* is not anchored on a policy framework. As a result, this has created jurisdictional overlaps of respective mandates and inconsistencies that have affected the implementation of the Power of Mercy Advisory Committee's mandate. Further, the Committee lacks operational autonomy to give full effect to provisions of Article 133 of the Constitution.

These challenges have affected the performance of functions of the Advisory Committee.

(ii) Prisons Act (Cap 90)

The *Prisons Act*, and the *Prisons Rules*, provide for remission, parole, community supervision orders and review of sentences for offenders serving long-term sentences and those detained at the President's Pleasure by Prison Board of Review.

Section 46 provides that offenders serving a term of imprisonment greater than one month, with the exception of those sentenced to life imprisonment may earn a remission of one third of their sentence "by industry and good conduct". It further provides that remission may be granted by the Commissioner General of Prisons "on the grounds of exceptional merit, permanent ill-health or other special ground" but an offender may also be 'deprived' of remission "in the interests of the reformation and rehabilitation of the prisoner" or "in the interests of public security or public order" where the Minister for the time being responsible for internal security considers that it is in the interests of public security or public order. The Act also provides that on the recommendation of the Commissioner, the Minister may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special grounds.

Section 47 of the *Prisons Act* provides for the imposition of a supervision order in respect of offenders who are discharged. Such an order is compulsory in respect of repeat offenders, and is at the discretion of the Commissioner for other offenders "where he considers it necessary or desirable in the interests of the rehabilitation of that prisoner." The order is "subject to such terms and conditions as may be prescribed", and any offender who breaches these conditions may have their remission revoked and be returned to incarceration. There are no guidelines on the exercise of this discretion by the Commissioner.

Challenges

The *Prisons Act* and *Prisons Rules, 1963* have not been reviewed to align with the provisions of Article 133 of the Constitution. Further, while the *Prisons Rules, 1963* provide for review of indeterminate sentences by Prison Board of Review and a mandate to support rehabilitation, these fundamental aspects of a comprehensive and successful penal system aimed at rehabilitation and reintegration are not being operationalized, to the detriment of both offenders and society.

(iii) Criminal Procedure Code (Cap 75)

The *Criminal Procedure Code (CPC)* contains provisions related to accused persons who are of unsound mind and consequently incapable of making defence, and to persons who are not insane but do not understand the criminal proceedings against them, and provide that the President may order such persons to be detained in a mental hospital, prison or other suitable place of safe custody.

Provision is made for regular review of such detention, and the President is empowered on review to order that the person continue to be detained, or that the person be discharged or otherwise dealt with in accordance with conditions, which may include supervision to ensure the accused person's and the public's safety and welfare. The *CPC* also provides for supervision of an offender for a period of time post-release from incarceration.

Challenges

Section 162-167 of the *CPC* has not been amended to align with Article 133 of the Constitution. Several court decisions have found indeterminate detention at the President's Pleasure to be unconstitutional.

(iv) Penal Code (Cap 63)

The *Penal Code* sets out the different types of punishment available to be imposed on a convicted offender, including imprisonment. It further provides that an offender who has been convicted of an offence that attracts the death penalty but who was under the age of eighteen years at the time of commission of the offence, is to be detained at the President's Pleasure.

Challenge

Section 162-167 of the *Penal Code* has not been amended to align with Article 133 of the Constitution. Several court decisions have found indeterminate detention at the President's Pleasure to be unconstitutional.

(v) Mental Health Act (Cap 248)

The *Mental Health Act* provides for detention and treatment of persons in a mental health hospital in accordance with the *Criminal Procedure Code* and empowers the Kenya Board of Mental Health to authorize places within prisons where offenders suffering from mental disorder may be detained and treated during their term of remand or imprisonment.

Challenges

The criminal justice system deals with mental illness in a profoundly broken way, leading to tremendous anguish and suffering among mentally ill people locked away behind bars. This situation is as a result of a number of factors:

- (a) Individuals detained at the President's pleasure on account of mental illness remain in detention for an exceedingly long period as a result of contradictory laws.
- (b) Some of the mentally ill offenders pose a danger to themselves and the community and others are unwanted by their families and thus have nowhere to go if released hence they remain incarcerated.
- (c) Released offenders face a considerable challenge in accessing medical care due to poverty and lack of support.
- (d) There are various decisions of the High Court touching on sections 162 -167 of the Criminal Procedure Code on detention of mentally ill offenders at the Pleasure of the President. Despite the court rulings, majority of those affected are still serving indeterminate sentences due to lack of a framework to review and address their cases.
- (e) Section 4 of the Act establishes the Kenya Board of Mental Health whose functions are provided at section 5. The functions of the Board do not expressly provide for review of offenders found guilty but insane by courts of law. Under the circumstances the Medical Superintendent constitutes an ad hoc committee of experts to evaluate the mental status and home environment of the offender for possible consideration by the Power of Mercy Advisory Committee.

(vi) Probation of Offenders Act (Cap 64)

The *Probation of Offenders Act* provides for conditional release of a convicted offender into the community under supervision of a probation officer, subject to conditions that a court considers necessary for securing the good conduct of the offender or for preventing repeat of the offence or the commission of other offences. A probation order is for a specified period, and can be revoked if the offender violates its conditions or re-offends, in which case a court can order that the offender be arrested and a sentence of imprisonment imposed.

(vii) Community Service Orders Act, 1998

The *Community Service Orders Act, 1998* provides for community service orders to be made upon conviction for an offence for which a court determines that a term of imprisonment for less than three years is either mandated or appropriate, and a sentence of community service is substituted for the sentence of imprisonment.

(viii) Kenya Defence Forces Act, 2012

The *Kenya Defence Forces Act, 2012* contains provisions substantively similar to the *Criminal Procedure Code* with regard to findings of mental disability and detention at the President's Pleasure. Like the *Penal Code*, it provides for sentences including imprisonment, and confirms that the power of mercy applies to offenders convicted by court-martial, as does the *Armed Forces Rules of Procedure, 1969*. The *Kenya Defence Forces (Imprisonment) Regulations, 2017* provides for sentences of imprisonment longer than 42 days to be served in a 'civil prison', and allows for remission of sentences.

(ix) National Police Service Act (No. 11A of 2011)

The *National Police Service Act* provides for the Directorate of Criminal Investigations to maintain all criminal records, which includes details of all complaints and charges preferred, the names of persons arrested and the offences with which they are charged.

(x) High Court (Organization and Administration) Act, 2015

The *High Court (Organization and Administration) Act, 2015* and the *High Court (Organization and Administration) (General) Rules, 2016* provide for the Registrar of the High Court to cause records of the proceedings of the Court to be kept and access to such records facilitated, taking into account the need to safeguard the rights and welfare of vulnerable persons, and further mandates the Registrar to provide systems for disposal and destruction of records.

(xi) Magistrates' Courts Act, 2015

The *Magistrates' Courts Act, 2015* provides for the court administrator to keep records of the proceedings of the magistrate's court.

(xii) Court of Appeal (Organization and Administration) Act, 2015

The *Court of Appeal (Organization and Administration) Act, 2015* provides for the Registrar of the Court of Appeal to keep records of the proceedings of the Court and to facilitate access to such records.

(xii) Transfer of Prisoners Act, 2015

The *Transfer of Prisoners Act, 2015* provides that foreign offender serving a sentence of imprisonment, offenders on parole, and mentally ill offenders subject to review of sentence, to be transferred from Kenya, if all appeals are exhausted and the offence is the same in both countries, and for such offenders to be granted mercy by the POMAC even while serving their sentence in the other country. The Act similarly provides for transfer to Kenya of persons convicted of offences in a foreign jurisdiction, and for the sentence imposed by another country be enforced in Kenya. The Act clarifies that an offender transferred to serve a sentence in Kenya may be eligible for mercy in accordance with the Power of Mercy Act 2011 and any reprieve granted by the transfer country must be enforced in Kenya, even if such reprieve is granted after the person has been transferred to and is serving the sentence in Kenya.

(xiv) Victim Protection Act, 2014

The *Victim Protection Act, 2014* provides that a victim of an offence has the right to be heard in matters affecting the victim, and to submit information to the POMAC on the release or pardon of an offender. The dignity, privacy, values and beliefs of the victim and the right to information and freedom from discrimination are protected. The victim has a right to information on the offender, including date of release from prison or other correctional institution and any conditions attached to such release. Where the victim is a child, the best interest of the child is to be accorded paramount consideration.

(xv) Witness Protection Act (No. 16 of 2006)

According to the *Witness Protection Act*, necessary and reasonable action should be taken to protect the safety and welfare of persons who are witnesses in proceedings. This includes a person who gives evidence in relation to an offence and requires protection on the basis of an existing threat or risk.

(xvi) Children Act, 2022

The *Children Act, 2022* defines a child as a human being below the age of eighteen years. The Act stipulates that the best interests of a child must be the primary consideration of administrative agencies in all actions concerning that child. judicial and administrative institutions are required to accord paramount consideration to interests of the child and to safeguard and promote the rights and welfare of the child and secure for the child such guidance and correction as is necessary for the welfare of the child. They are similarly required to secure welfare, necessary guidance and correction for the child in public interest. The right of the children to express themselves in matters affecting them is protected.

The Act prohibits the imprisonment of a child, but provides that a child offender between the ages of ten and fourteen years may be committed to a rehabilitation school, and a child offender between the ages of fifteen and seventeen years may be committed to a borstal institution.

(xvii) Borstal Institutions Act (Cap 92)

The maximum amount of time a young offender may be committed to a borstal institution is three years. The *Borstal Institutions Act* and the *Borstal Institutions Rules, 1963* provide for youthful offenders who are committed to a borstal institution to be released on licence, discharged, and subject to supervision upon release from the institution. Further, records must be kept in relation to all inmates of borstal institutions.

(xviii) Sentencing Policy Guidelines

The *Sentencing Policy Guidelines (2016)* clarify that objectives of sentencing are retribution, deterrence, rehabilitation, restorative justice, victim and community protection and denunciation. A fair sentence satisfies these objectives, which may necessarily require a balancing because of potential conflict. In the absence of a mandatory minimum sentence, a sentencing court is directed to consider a non-custodial sentence if such can meet the sentencing objectives, and in doing so must take into account the following factors:

- (a) The seriousness of the offence – a misdemeanor should not attract a custodial sentence unless there are objective aggravating circumstances that favour incarceration;
- (b) The offender's criminal history – depending on the gravity of the offence, a first-time offender should be considered for a non-custodial sentence unless there are objective aggravating circumstances that favour incarceration;
- (c) The offender's character – offenders who are remorseful and are not likely to re-offend should not be subject to incarceration;
- (d) The offender's responsibilities vis-à-vis third parties – where it is proven that the offender is the sole or main provider for dependents, particularly vulnerable persons, a non-custodial sentence should be preferred so long as injustice does not result;

- (e) Community protection – a custodial sentence should be imposed where there is evidence to suggest that a non-custodial sentence may pose a threat to the safety of one or more persons; and
- (f) Child/youth offenders – custodial sentences should be the last resort for children and youth in conflict with the law, unless it is in the best interests of the child or the youth in all the circumstances.

These objectives and factors are fundamental to sentencing and are therefore relevant considerations in decisions about early release from a custodial sentence.

2.3 SYSTEMIC CHALLENGES IN THE ADMINISTRATION OF POWER OF MERCY

1. Vulnerable Offenders

Challenges

In prison, certain groups of inmates are subject to disadvantages due to specifics of their physical condition, mental health, advanced age, etc. Categories of vulnerable offenders who may require special consideration under the power of mercy include:

- (a) Offenders who suffer from an incurable terminal illness or a highly contagious disease;
- (b) An offender who is entirely incapacitated on account of old age, disability or any other reason and requiring assistance with the activities of daily living;
- (c) Intersex persons who may be at risk due to their imprisonment;
- (d) An offender who is critically ill and fighting for his/her life; or
- (e) Is pregnant, a lactating mother or the sole caretaker of young dependent children.

Policy Recommendations on Vulnerable Offenders

This policy recommends that vulnerable offenders be ring-fenced and prioritized by the Committee.

Strategies

Prioritization of vulnerable offenders will be achieved through the following approaches:

(i) Substitution of a less severe form of punishment

The substitution of a lesser severe form of punishment given after a conviction for a crime is also known as Commutation. The punishment can be lessened in severity, in duration or both.

- (a) The process of commutation should be provided for in law and overseen administratively by the Power of Mercy Advisory Committee.
- (b) The *Power of Mercy Act, 2011* should be amended to provide for individual petitions for commutation of sentence, including from a custodial to a non-custodial sentence, to be made on the basis of compassionate grounds such as advanced age, terminal illness, severe disability.

- (c) The *Power of Mercy Act, 2011* should be amended to provide for petitions to be made by the Commissioner General of Prisons on behalf of convicted offenders.

(ii) Postponing the carrying out of a punishment for a specified or indefinite period

Postponing the carrying out of a punishment is a type of relief that pauses the carrying out of a sentence imposed by a court either for a specified or indefinite period. The Committee reviews and considers each petition for postponement and prepares a recommendation for the President. The President retains sole discretion over when and for how long to postpone the carrying out of a punishment.

(iii) Remission of all of part of the punishment

Remission of all or part of punishment within the meaning of Article 133 of the Constitution refers to the cancellation or extinguishment of all or part of a penalty imposed on the petitioner by a court. The remission may be granted without conditions or with conditions which the petitioner will have to accept prior to release from prison.

(iv) Treatment of mentally ill offenders

- (a) Offenders who are determined by a court to be guilty but insane, or unable to understand the proceedings against them, should have their cases reviewed by an independent administrative body provided for under the *Mental Health Act*.
- (b) It is recommended that amendments be made to the *Mental Health Act* to provide for the establishment of The Mental Health Offenders Review Committee (MHORC).
- (c) The Mental Health Offenders Review Committee shall be an administrative body that shall provide advisory services to the Power of Mercy advisory Committee.

2. THE POWER OF MERCY ADVISORY COMMITTEE

Challenges

The legal, policy, institutional and operational constraints that hinder effective delivery of service by the Committee include:

(i) Organization structure

The Power of Mercy Advisory Committee as currently structured is unable to fully implement the constitutional provisions on power of mercy. The Committee lacks key technical staff to enable it effectively undertake its mandate. Currently, the existing technical staff are seconded from the Executive Office of the President.

(ii) Operational autonomy

The Committee has faced considerable challenges in implementing its mandate as it lacks the budgetary and operational autonomy to give full effect to Article 133 of the Constitution. The Secretary to the Committee is neither an accounting officer nor an authorized officer and thus the Committee is entirely dependent on the Executive Office of the President on funding as well as human resource management affairs.

(iii) Transfer of pardon officers

In determination of petitions for mercy, POMAC depends heavily on reports prepared by Pardon Officers stationed in correctional facilities. Pardon Officers who are currently prison officers are under direct command of the Commissioner General of Prisons and are transferable from one facility to another. The movement of these officers affects preparation, follow up and determination of petitions for mercy.

(iv) Reporting lines for pardon officers

Pardon Officers have traditionally been appointed from among prison officers in a correctional facility. On matters related to the power of mercy pardon officers report directly to the Committee.

Policy recommendations

It is recommended that POMAC be restructured to address the operational shortcomings in the Committee.

Strategies

In order to implement the policy recommendations, the following approaches are proposed:

(i) Review of the organisation structure of POMAC

It is recommended that the Committee's organizational structure be reviewed to enable it to give full effect to Article 133 of the Constitution. It is also recommended that the Secretary to the Committee be designated as an accounting officer as well as an authorised officer.

(ii) Hiring of Petitions Officers

It is recommended that Petitions Officers be hired and stationed in correctional facilities to support the implementation of the functions of POMAC at county level.

(iii) Establishment of Prison Based Petitions Sub-Committees

It is further recommended that Prison Based Petitions Committees comprising of the petitions officer and correctional service officials be established in each prison facility to support the petition process.

3. THE PETITION PROCESS

Challenges

The challenges in the petition process include the following:

(i) Lack of prisoner unique identifier

The management of offenders includes transfer of prisoners from one correctional facility to another. Currently, prisoners lack unique identifier, which can facilitate their tracing whenever they are transferred from one facility to another.

(ii) Lack of reliable petitions system

Stakeholders including petitioners for mercy, prisons officials and probation officers have previously raised issues related to lack of feedback, efficiency, accountability and transparency in the petition process.

Policy recommendation

It is recommended that the petition system be reviewed and enhanced so as to provide better services to stakeholders.

Strategies

(i) Development of the Electronic Petitions Management Information System (ePOMPMIS)

In acknowledgement of the challenges and recommendations by various stakeholders, POMAC has developed and implemented an Electronic Power of Mercy Petitions Management Information System (EPOMPMIS) in partnership with the ICT Authority that is intended to automate the entire petition process. The use of EPMIS will:

- (a) Ease access to POMAC for petitioners, key stakeholders and the general public.
- (b) Simplify the process of commencing a petition and reduce time required in filing and processing of petitions for pardon.
- (c) Provide a reliable tracking mechanism that will improve real time monitoring of the status of a petition.
- (d) Enable timely acquisition of necessary reports from various stakeholders such as the security agencies, Probation Service, Prisons Service, victims and the general public.
- (e) Provide a centralized petitioner's database that can be easily accessed by stakeholders.
- (f) Provide a dependable records management system that helps to ensure the integrity of petition records.
- (g) Enhance transparency, credibility and accountability of the petition process.
- (h) Contribute to the prudent use of public resources.

4. EFFECT OF A PARDON

Challenges

(i) Retention of criminal records

Offenders who have been pardoned and released into the community but whose criminal record is used to grant them negative police clearance certificates face considerable challenges in obtaining employment or accessing business opportunities. The purpose of imprisonment is reform and rehabilitation. Reformed ex-offenders who are not able to earn an income are at risk of re-offending in order to survive and it is therefore important that they be facilitated to interact with society and have equal opportunity as others.

Policy recommendations

There is a need to redefine the policy and administrative circumstances under which the records of reformed offenders who have consistently shown good character are maintained

Strategies

(i) Sealing of criminal records

It is recommended that rehabilitated offenders be eligible to petition for the sealing and the resealing of the said record if the offender is convicted of a defined offence. This is in line with global best practice. This proposal if implemented will facilitate reformed offenders to access employment, business and educational opportunities and reintegrate better into society. The implication of this provision is that the criminal record will not be used against the pardonee as long as the pardonee is reformed. However, the criminal record is not destroyed.

5. RESETTLEMENT AND REINTEGRATION OF PARDONED OFFENDER

Challenges

The Power of Mercy Advisory Committee conducts a post release monitoring and evaluation programme that entails following up on pardon offenders to assess how they are reintegrating back into the community. The follow up also involves engaging with key stakeholders at the grassroots. The Committee has noted a number of challenges faced by pardoned offenders:

(i) Lack of facilities for gradual reintegration

Rehabilitated offenders require gradual reintegration into society supported with psychological, social and material assistance along with supervision and conditions. These elements ease the offender's transition back to independent and self-sustained living and reduces the chances of recidivism, particularly for longer term offenders. A successful program of gradual reintegration could include provision of interim/temporary accommodation – such as halfway houses.

(ii) Unacceptance by family and community

Ex-offenders face social stigma from their families and their home community. Without family or community support, access to basic needs such as clothing, shelter, food and accommodation becomes difficult leading to destitution and the risk of falling back to crime for survival increases.

(iii) Psychosocial challenges

By the time offenders are released from prison they may have advanced in age and lost out on economic and social progress compared to their peers. This becomes a source of depression, regret and feelings of inferiority. This results in significant psychological burden on the released offenders necessitating continuous psychosocial support.

(iv) Disinheritance

While Article 40 of the Constitution prohibits the arbitrary deprivation of property rightfully owned, many offenders are disinherited by their families, and their properties sold while they are in prison, leaving the individuals landless and homeless. This contributes to a sense of bitterness among the pardoned offenders and is a likely trigger for aggravated family conflicts which could result in re-offending.

(v) Inadequate aftercare services

The struggle to adjust after imprisonment is largely a result of limited aftercare service provision to ex-offenders. Aftercare consists of regularly checking on the offender to see if they are adjusting to the outside environment and helping them deal with the challenges associated with resettlement and reintegration. Provision of these services is however hindered severely by lack of a legal and policy framework and inadequacy of resources.

(vi) Inability to earn a livelihood

Many pardoned offenders struggle to earn a livelihood due to lack of necessary support from their families and other stakeholders. Also, the retention of criminal records limits the opportunities that can be accessed by pardoned offender.

Policy recommendation

There is need for a comprehensive framework to support the resettlement and reintegration of pardoned offenders.

Strategies

(i) Aftercare Policy and Bill

The National Aftercare Policy and Bill be developed and implemented by the Correctional Services.

(ii) Multi-agency Petitions Committees

Multi-Agency Petitions Committees be established in each county to support the resettlement and reintegration of pardoned offenders.

6. CONTRAVENTION OF PARDON CONDITIONS

Challenges

There is no clear procedure to cover instances of failure by the pardoned offenders to comply with conditions of their release.

Policy recommendation

It is recommended that there be introduced a framework for recall of pardoned offenders who breach the conditions of their release.

Strategies

(i) Development of a framework for the implementation of Conditional Pardons

Conditional pardon entails the conditional placement of a pardoned offender into the community. Upon grant of a conditional pardon by the President, the offender will be released from prison and placed under the supervision on specified conditions, which the offender will have to accept prior to release. A conditional pardon may be revoked where the offender fails to fulfill conditions on which a pardon was granted. In such instances the offender may be arrested and presented to a prison facility to serve the remaining part of the sentence.

Offenders who have been granted free pardon will be released unconditionally. All other offenders who are granted pardon in the form of different reliefs may be subject to conditions.

7. REMISSION UNDER SECTION 46 OF THE PRISONS ACT

Challenges

Remission is a reduction of the length of a sentence earned through good behaviour, entitling the offender to be released from imprisonment. The relevant provision of Article 133(1) is (d) "remitting all or part of a punishment". (Challenge is the distinction of remission as provided under article 133 and remission under section 46 of the Prison Act).

Policy recommendation

Remission as provided for in Section 46 of the *Prisons Act* provides remission as a critical routine management and administration tool for prison officials to encourage rehabilitation and thus it should be retained.

Strategies

Development of a framework for remissions under Article 133

The Power of Mercy Advisory Committee will, where necessary, determine terms and conditions of remission of all or part of punishment based on criteria determined by the Committee.

The remission provided for under Article 133 will be implemented separately from the remissions administered under the Prisons Act which provides that an offender may earn a remission of one third of their sentence.

8. NON-CITIZEN OFFENDERS AND KENYAN OFFENDERS IN FOREIGN JURISDICTIONS

Challenges

A number of petitioners for the power of mercy are foreigners held in Kenyan prisons for various offences. Currently, there is lack of a clear policy on non-citizen offenders and the Committee has been engaging the offenders on a case-by-case basis. Considering the unique circumstances of this category of offenders and taking into consideration views of the various

stakeholders in the implementation of the power of mercy, it is necessary to provide clear guidelines on how they will be engaged by the Committee.

Policy recommendation

It is recommended that foreigners serving jail terms in Kenyan prisons be eligible for the reliefs provided under Article 133.

Strategies

(i) Development of guidelines for non-citizen offenders

Pardon is a privilege that may be granted by Kenya to citizens of another country for mutual benefit. Such foreigners may be granted pardon with conditions that may include that they be expatriated upon release. A foreigner expatriated from Kenya may be prohibited from returning to Kenya until the remainder of their sentence has lapsed.

(ii) Negotiation with other jurisdictions

It is proposed that the strategies provided for in this policy be the basis for negotiation with other jurisdictions for the release of Kenyan offenders and that such negotiations be grounded on the principle of reciprocity.

9. SUPERVISION OF PARDONED OFFENDERS

Challenges

The existing legal framework provides for release from prison on conditions to be fulfilled by the pardoned offender. However, the law is silent on who should supervise the pardoned offenders and for how long. Stakeholders are generally concerned with the level of supervision that is available for pardoned offenders. Also, there is no clear procedure to provide for the revoking of pardon due to failure by the pardoned offenders to comply with set conditions.

Policy recommendation

There is need for the development of a frame work that provides clarity on the supervision of pardoned offenders.

Strategies

(i) Supervision Framework

Make amendments to legislation to provide for the supervision of pardoned offenders. This includes providing clarity on who may be mandated to supervise pardoned offenders. Provide for a clause on revocation of pardon in the case of breach of conditions by the pardoned offender.

(ii) Introduction of a New Parole System

It is recommended that a new system of Parole be introduced in the country. Parole is a form of strict conditional release into the community under the supervision of a Parole Officer. The

offender's freedom depends upon a risk assessment prior to release from prison and satisfactory compliance with the conditions imposed by a Parole Board upon release. An offender who is on parole is still serving the sentence that was imposed by the court, and therefore if the conditions of release are violated, the parole is revoked and the offender is returned to prison to serve the balance of the sentence. The purpose of parole is to bring prisoners back into the community in a manner that enables them to become productive members of the community, free of a criminal lifestyle. Research conducted in other jurisdictions has shown that prisoners who are granted parole have a lower tendency to reoffend than prisoners who are not placed on parole. Many jurisdictions have adopted and implemented parole in recent times.

The recommendations on parole are that:

- (i) A new system of parole be introduced;
- (ii) The proposed parole system be implemented by a National Parole Board.

3.0 CHAPTER THREE

3.1 STRATEGIES FOR IMPLEMENTATION OF THE POWER OF MERCY IN KENYA

This section discusses the strategies and measures aimed at giving full effect to Article 133 of the Constitution.

Introduction

On the petition of any person, Article 133(1) of the Constitution provides for the four reliefs that the President may grant on the advice of the Power of Mercy Advisory Committee. These are—

- (a) Free or conditional pardon to a person convicted of an offence;
- (b) Postponing the carrying out of a punishment, either for a specified or indefinite period;
- (c) Substituting a less severe form of punishment; or
- (d) Remitting all or part of a punishment.

Commencing a petition

An application for the exercise of the power of mercy shall be by a written petition in the prescribed form in accordance with the guidelines and criteria prescribed in the form or through the Electronic Petitions Management Information System. However, a petition that provides the requisite information shall not be incompetent only for the reason that it does not accord strictly with the prescribed format.

Eligibility to file a petition for exercise of mercy

A petition shall not be permitted where the person for whose benefit it is made, is on probation or serving a suspended sentence or whose application for any judicial remedy such as an appeal is pending before a court.

Consideration of petitions

The Committee has all the necessary powers to determine a petition including calling for evidence, conducting interviews, carrying out investigations and receiving and reviewing necessary reports from appropriate government agencies and/or officials before making relevant recommendations to the President.

The Committee may also consider whether the convicted criminal offender has served at least one – third of a determinate sentence pronounced by a court and where a person is convicted and sentenced to imprisonment for life or to death and their sentence has not been effected, has served for at least ten (10) years.

3.1.1 FREE PARDON

A ‘free’ pardon within the meaning of Article 133(1)(a) may be granted in very limited special circumstances with the effect that the person’s is released from prison without any

conditions. The free pardon will be granted in limited and exceptional circumstances, which may include, where—

- (i) The offender is a young person found to be culpable of an offence before attaining the age of 18 years, except in cases of violent offences;
- (ii) The offender is a foreigner and is required to return to home country in the interest of diplomatic relations; and
- (iii) There is need to grant the offender a pardon in the national interest.

With the approval of the President, the offender shall be released unconditionally and the records for the crime committed shall be sealed.

3.1.2 CONDITIONAL PARDON

Conditional pardon entails the conditional placement of a pardoned offender into the community. Upon grant of a conditional pardon by the President, the offender will be released from prison and placed under the supervision of a Probation Officer on specified conditions which the offender will have to accept prior to release from prison.

Revocation of conditional pardon

A conditional pardon may be revoked where the offender fails to fulfill conditions on which a pardon was granted. In such instances the offender may be arrested and presented to a prison facility to serve the remaining part of the sentence.

3.2 SEALING OF CRIMINAL RECORDS

A conditional pardon may be granted through the sealing of the offender's criminal records in the National criminal data base. The relief will be available for persons who have been pardoned or persons convicted of offences and have successfully served the prison sentence and have remained crime free after release from prison.

Eligibility

Persons convicted of a misdemeanor or petty offences will be eligible to petition for sealing of their records three (3) years after completion of a custodial sentence and payment of any associated fine. The individual will be required not to have committed a crime during the three-year period.

Persons convicted of felony offences will be eligible for the relief after completion of a five (5) year period after completion of a custodial sentence and payment of any associated fines. The individual will be required not to have committed a crime during the five-year period.

Due to the serious public safety risk associated with repeat offenders (those who have committed two or more felonies for which they have been sentenced to imprisonment), sex offenders (e.g. those convicted for rape, defilement, exploitation), and violent offenders who caused serious bodily harm to a victim, a conditional pardon in the form of sealing of records is not available to such offenders until after a period of fifteen years with no further criminal convictions, completion of a prison sentence and payment of any associated fine.

In all cases, the offenders will make an application to the Power of Mercy Advisory Committee. They will be required to provide evidence that they have been of good conduct since their release from prison. Towards this end, petitioners may be required to provide an affidavit of a probation officer or a religious leader, community leader, national administration official or any other person of good standing in the community attesting to their rehabilitation.

Unsealing of records

The suspended criminal records will be activated in the criminal records database in the event the pardoned individual is convicted of an offence.

3.3 POSTPONING OF THE CARRYING OUT OF A PUNISHMENT

This is the suspension of a punishment imposed by a court in relation to a crime for a definite or indefinite period as the President may determine. Generally, some of the exceptional circumstances under which an offender could apply for postponement of their punishment include, on medical grounds or in the national interest.

Conditions for release

Offenders who have been granted mercy in the form of postponing of their punishment will be placed under the supervision of probation officers. These offenders must comply with all standard conditions of release as well as any special conditions imposed.

3.4 SUBSTITUTING A LESS SEVERE FORM OF PUNISHMENT

Substituting a less severe form of punishment also referred to as Commutation refers to the replacement of a less severe punishment for a judicially imposed sentence. Substitution does not necessarily lead to a relief of all legal consequences, rather it is simply a change in the type of punishment. This could be replacement of the form of sentence e.g. from death sentence to life imprisonment or reduction of prison time. Substitution may be granted—

- (a) On compassionate grounds; or
- (b) Where the Commissioner General Prisons petitions for mass commutations on behalf of convicted offenders

In both instances the Petitions Officer in each prison facility will process petitions for consideration by the Power of Mercy Advisory Committee. The Committee will coordinate with—

- (a) The Prisons Service to identify offenders whose sentences ought to be considered and reasons for consideration;
- (b) Probation and Aftercare Services for post-release supervision in the community.

3.5 REMISSIONS OF ALL OR PART OF A PUNISHMENT

Remission of all or part of punishment within the meaning of Article 133 of the Constitution refers to the cancellation or extinguishment of all or part of a penalty imposed on the petitioner by a court. The remission may be granted without conditions or with conditions which the petitioner will have to accept prior to release from prison.

Remission will be granted on grounds of good conduct and industry, exceptional merit, vulnerability, permanent ill health or other special considerations. Applications for remission of all or part of punishment shall be made through the petitions officer in a prison facility. The Power of Mercy Advisory Committee will, where necessary, determine terms and conditions of remission of all or part of punishment based on criteria determined by the Committee.

The remission provided for under Article 133 will be implemented separately from the remissions administered under the Prisons Act, which provides that an offender may earn a remission of one third of their sentence. However, it is necessary to note that the laws will be applied in a complementary manner.

3.5.1 Types of Remission

Remission will either be conditional or unconditional depending on circumstances, industry and conduct of the offender.

Unconditional remission

Offenders with a clean record of discipline shall be automatically released without conditions or supervision in the community, so that all of the remainder of their term of punishment is remitted, with no possibility of revocation.

Conditional remission

Pardoned offenders who have been granted conditional remission will be issued with a Conditional Remission Order (CRO) in addition to a Pardon Warrant. The CRO will be valid until the end of their sentences. The pardoned offenders will be under the supervision of probation officers during the remission period.

3.5.2. Revocation of remission

Section 47 of the *Prisons Act* provides for the imposition of a supervision order in respect of offenders who are discharged from prison. Such an order is compulsory in respect of repeat offenders, and is at the discretion of the Commissioner for other offenders "where he considers it necessary or desirable in the interests of the rehabilitation of that prisoner." The order is "subject to such terms and conditions as may be prescribed", and any offender who breaches these conditions may have their remission revoked and be returned to incarceration. Offenders granted conditional remission under Article 133 of the Constitution will be subject to these provisions.

Conditional remission may be revoked if the offender re-offends or otherwise shows gross misconduct or repeatedly breaches the conditions of release. Once a conditional remission is revoked, the CRO will be recalled and the offender will be arrested and presented to the nearest prison facility. Depending on the circumstances, the offender may have to serve the remaining part of the sentence as indicated in the Conditional Remission Order (CRO).

3.6 PRISON BASED PETITIONS SUB – COMMITTEES

Each prison facility will establish a Prison Based Petitions Sub-Committee comprising the Officer in Charge of the prison facility, Petitions Officer, Documentation Officer, Welfare Officer and a Probation Officer.

The Officer in Charge in each prison facility shall be the chairperson of the sub-committee and shall have the power to co-opt any other stakeholder from the internal mechanism of the prison to the sub-committee. The Petitions Officer will be the secretary to the sub-committee and will report to the Power of Mercy Advisory Committee. The sub-committee will advise the offenders on how to apply for pardon.

The sub-committee will also be responsible for ensuring all the necessary documentation required for a petition is in place and for coordinating with the POMAC Committee to arrange for interviews with petitioners for pardon.

3.7 SUPERVISION AND MONITORING

All pardoned offenders will be supervised and monitored by the Probation and Aftercare Service in accordance with the set conditions for the period specified in the Pardon Warrant.

Intensive Supervision

Intensive supervision is a way of releasing an offender back into the community while maintaining severe restrictions. Depending on the circumstances, some pardoned offenders may be subject to intensive supervision upon their release from prison. In such cases, the Probation Service will be supported by the Police Service, the Prison Service and National government administrative officers in supervising and monitoring of the pardoned offender. In such instances, the conditions for release of the offender contained in the pardon warrant will expressly stipulate that he/she will be subject to intensive supervision for a given period and the offender will have to accept the conditions prior to their release from prison. A copy of the pardon warrant will be sent with the respective County Commissioner, County Probation Director, County Police Commander and County Prison Commander to make arrangements for supervision and monitoring of the pardoned offender.

3.9 RESETTLEMENT AND REINTEGRATION SUPPORT

The Probation and Aftercare Service shall provide aftercare support to the offenders granted pardon to facilitate their successful resettlement and reintegration. In this regard it is anticipated that the Aftercare Policy and Bill will be developed and enacted by the Correctional Services to provide for a legal framework for the provision of aftercare services to released offenders. The Probation and Aftercare Service will be supported by the County Multi Agency Petitions Committees.

3.10 COUNTY MULTI-AGENCY PETITIONS COMMITTEES

There will be established in each of the counties a County Multi-Agency Petitions Committee working under the County Commissioner to enhance vetting of petitioners and to support the Probation and Aftercare Service in the resettlement and reintegration of pardoned offenders. The membership of the Committees will comprise state and non-state actors.

Functions of the committees

- (a) Sensitize the community on power of mercy as a means to improve acceptability of offenders.
- (b) Develop strategies to address stigma faced by offenders.

- (c) Facilitate the development of substantive partnerships between stakeholder organizations to facilitate resettlement and reintegration of pardoned offenders.
- (d) Strengthen the capacity of the community to be an active partner in resettlement and reintegration of offenders.
- (e) Provide information as may be required to support the petition process.
- (f) Support the Probation Service in monitoring of pardoned offenders.

Composition of the County Multi-Agency Petitions Committees

The membership of the committee may comprise;

County Commissioner — Chairperson

County Security Committee

County Commander Prisons

Representative of the County Government

County Director of Health Services

Representatives of NGO's/Civil Society

Representative Inter Religious Council of Kenya

Three Community Leaders

Where necessary, a representative from the Children's Department

Any other person deemed fit by the Chairperson

The County Director of Probation and Aftercare shall be the Secretary to the Committee

3.11 VICTIM PARTICIPATION

Where the relief sought relates to a conviction for a felony in which there was a victim and the Committee determines that there's need to contact the victim, reasonable efforts will be made to notify the victim. The victim notified shall be entitled to make representations to the Committee and may submit a victim impact statement either orally or in writing.

3.12 NON-CITIZEN OFFENDERS

Foreigners serving jail terms in Kenyan prisons are eligible for the reliefs provided in this policy on condition that they may be expatriated upon release. A foreigner expatriated from Kenya will be prohibited from returning to Kenya until the probationary period (remainder of their sentence) has lapsed. The frameworks in this policy may form the basis for bilateral negotiations with other jurisdictions for the same reliefs to be available to Kenyans imprisoned in foreign countries.

3.13 PARDON WARRANT

A pardon warrant is an order from the President indicating that an offender has been granted a pardon. The pardon warrant also contains relevant information including the type of relief that has been granted to the offender and the conditions that the offender has to abide by for a specific period of time.

4.0 CHAPTER FOUR

4.1 POLICY CO-ORDINATION AND IMPLEMENTATION FRAMEWORK

4.1.1 Introduction

This framework aims at enhancing efficiency and effectiveness by promoting collaborative synergy between stakeholders in the implementation of Article 133. The framework details institutional linkages that will be critical to the successful implementation of the power of mercy policy. The framework allocates some of the core functions and duties that need to be undertaken by key stakeholders. It will also map out key actors and accordingly clarify their roles and responsibilities in the policy implementation.

4.1.2. Policy objectives:

- (a) To address any overlaps by aligning the operations of POMAC and its partner agencies with the provisions of Article 133 of the Constitution.
- (b) To provide clarity on roles and responsibilities of stakeholders in the administration of power of mercy.

4.1.3. Policy statements

- (a) The Committee will develop mechanisms for strengthening co-operation with all stakeholders.
- (b) The Committee shall hold regular stakeholder engagement and sensitization forums.

4.2 INSTITUTIONAL LINKAGES OF THE POWER OF MERCY

1. The President

In line with the Constitution the President will:

- (a) Appoint the members of the Power of Mercy Advisory Committee pursuant to advice by a selection panel; and
- (b) Exercise the Power of Mercy in accordance with Article 133 of the Constitution.

2. Power of Mercy Advisory Committee

The Power of Mercy Advisory Committee will be the central body in the administration of the power of mercy, with advisory and coordination role. The Committee will, in accordance with Article 133 advise the President on offenders to benefit from free pardon or conditional pardon, postponing the carrying out of a punishment either for a specified or indefinite period, substituting of a less severe form of punishment, and remission of all or part of a punishment. In addition to the Committee's functions to advise the President on the exercise of Power of Mercy and taking into account the views of the victims of the offence in respect to which it is considering making recommendations to the President, the Committee shall—

- (a) Advise the Directorate of Criminal Investigations to seal criminal records of the petitioner, where such a pardon is granted;

- (b) Establish regional offices and deploy Petitions Officers to correctional facilities. The officers will:
 - (i) Provide secretariat services to Prison Based Petitions Sub Committees in the facilities;
 - (ii) Sensitize prison officials on the power of mercy and petition process;
 - (iii) Sensitize offenders on the power of mercy;
 - (iv) Process petitions for consideration by the Committee;
 - (v) Compile rehabilitation reports on petitioners for mercy and submit to the Power of Mercy Advisory Committee;
 - (vi) Maintain register of petitioners and their transfers between correctional facilities; and
 - (vii) In case of mentally ill offenders who have petitioned for mercy, liaise with the health facility to which the offender is committed for timely submission of assessment reports.
- (c) Liaise with correctional facilities for release of beneficiaries of the reliefs provided in this policy.
- (d) Liaise with Probation and Aftercare Services for provision of the psychosocial support necessary for resettlement and reintegration of pardoned offenders.
- (e) Liaise with Probation and Aftercare Services and other relevant agencies for the purposes of supervision and monitoring of pardoned offenders.
- (f) Undertake or commission research and collect data on matters relating to the power of mercy.
- (g) Carry out any necessary investigations required to make a determination on a petition for power of mercy.
- (h) Partner with State and non-state actors to educate the public on the nature and implications of the Power of Mercy.

The Secretary shall be the authorized and accounting officer for the Power of Mercy Advisory Committee.

3. Attorney General's Office and Department of Justice

By virtue of Article 133(2) (a) of the Constitution, The Attorney-General is the chairperson of the Committee, and the Office of the Attorney General provides legal advice to the Committee.

4. Ministry of Interior and Coordination of National Government

State Department for Correctional Services

By virtue of Article 133(2) (a) of the Constitution, the Cabinet Secretary responsible for Correctional Services is a standing member of the Power of Mercy Advisory Committee.

(a) State Department for Internal Security and National Administration

The national government administration officers provide background information on petitioners for mercy. The officers also support the monitoring, resettlement and reintegration of offenders who have been granted mercy.

(b) Kenya Prisons Service

The Kenya Prisons Service hosts petitioners for mercy at correctional facilities. The Prisons Service also provides information required in regard to petitioners for the exercise of mercy. The Prison Service may also be co-opted to support the monitoring and supervision of pardoned offenders pursuant to section 47 of the *Prisons Act*.

(c) Probation and After Care Service

The Probation and Aftercare Service provides social information in the form of reports on offenders to the Committee. PACS is also responsible for monitoring and supervision in addition to supporting the resettlement and reintegration of offenders who have been granted mercy.

5. Ministry of Health

Medical officers including psychiatrists and other mental health professionals conduct risk assessments and provide to the Committee with progress reports which include recommendations in respect of petitioners who are held in mental health facilities.

6. National Police Service

The Directorate of Criminal Investigations vets offenders who are being considered for exercise of the power of mercy by providing criminal records to the Committee. The DCI will also be responsible for the sealing of criminal records for offenders who have been granted pardon. Additionally, the National Police Service may be co-opted to support the Probation Service in monitoring and supervising of pardoned offenders.

7. National Intelligence Service

The National Intelligence Service vets all petitioners being considered for mercy to ensure that the interests of the State are protected.

8. Office of the Director of Public Prosecutions

The ODPP provides the Committee with prosecutorial records relevant to a petition for power of mercy, which may include victim information or specific information on a petitioner.

9. Judiciary

The Judiciary is the custodian of all court records, and provides the Committee with court records including judgments passed by courts in respect of each petitioner.

10. National Council on the Administration of Justice

The Committee works with the NCAJ to coordinate with justice sector agencies involved in implementation of the power of mercy.

11. Witness Protection Agency

The Witness Protection Agency provides the Committee with advice on petitioners for mercy on a case-by-case basis as relevant in the circumstances.

12. Victim Protection Board

Victims and their families are entitled to participate in the Petition Process and may submit an impact statement either orally or in writing. The Victim Protection Board supports victim participation in Committee processes.

13. National Assembly

The Committee submits its Annual Report to Parliament for review.

14. Office of the Auditor General

The Office of the Auditor General audits the financial statements of the Committee.

15. Kenya National Commission on Human Rights

The KNCHR reviews the Committee's and stakeholder practices to ensure that the fundamental rights and freedoms of petitioners are observed, respected, protected, promoted and fulfilled.

16. Kenya Law Reform Commission

The Committee partners with the Kenya Law Reform Commission to strengthen its legal framework.

17. National Crime Research Centre

The Committee partners with the National Crime Research Centre to conduct research related to the power of mercy.

18. National Community Service Orders Committee

The National Community Service Orders Committee partners with the Committee in the processing of offenders whose sentences may be commuted to community service for the remainder of their sentences.

19. Council of Governors

The Committee through the Council of Governors engages county governments to provide support for the re-integration and resettlement of offenders who have been granted mercy.

20. The Public

Members of the public are key stakeholders in the resettlement and re-integration of offenders who are released into the community through exercise of the power of mercy.

21. Non-State Actors

The Committee partners with non-governmental organizations that have established linkages with correctional services, including religious organisations and community-based organisations.

22. The Media

The media acts as an important means by which the Committee publicizes and disseminates information on the power of mercy.

4.3 Duty to Cooperate

In respect of the application of this framework, the two levels of government shall co-operate and support the institutions established under the Policy and any related statutes to ensure effective discharge of their respective mandate.

5.0 CHAPTER FIVE

5.1 MONITORING AND EVALUATION

The Power of Mercy Policy will be guided by the National Monitoring and Evaluation Policy and other relevant policies. The National Monitoring and Evaluation Policy provides for the roles and responsibilities of all state and non-state institutions in the implementation of public projects and programmes by enhancing accountability, efficiency, effectiveness, transparency and utility. In order for the Power of Mercy Advisory Committee to effectively monitor and evaluate the status of implementation of the policy, the following interventions will be put in place:

Research

The Committee will regularly conduct research on –

- (a) best practices and trends in the administration of the power of mercy internationally and regionally;
- (b) the national social, economic, political, legal and institutional landscape relevant to implementation of this Policy, and analyze all information gathered to ensure relevance.

Reporting

The Committee shall prepare and submit to the President and to Parliament an Annual Report of its activities and outcomes at the end of each financial year.

Periodic reporting to the Committee's stakeholders shall be undertaken through the Committee's Strategic Plans.

Review

This Policy shall receive a mid-term review in two (2) years and a long-term review in five (5) years. *Ad hoc* reviews may nonetheless be undertaken from time to time whenever there is a substantive change in the legal, policy or institutional landscape.

6.0 CHAPTER SIX

6.1 RECCOMENDATIONS

Expected benefits of implementing the policy recommendations

1. Economic Benefits

According to statistics provided by the Prisons Service, the costs of incarcerating an offender in the Kenyan prison system, including meals, clothing, medical and other costs is approximately 240 KSh. each day. This means that every offender costs the government, and ultimately taxpayers, 87,600 KSh. per year. These costs tend to increase considerably as the offenders advance in age. The prison administration as well provides inmates with various rehabilitation programmes including formal education, vocational training and counseling which have budgetary implications.

According to statistics provided by the Prisons Service, Kenyan prisons are overpopulated with an average population that is double the capacity of the overstretched facilities.

It is necessary to use alternatives to imprisonment to divert offenders by removing those who need not necessarily be in prison. These include petty first-time offenders and those who have served long periods in prison and have shown good character.

Power of Mercy

To date, **10,419 offenders** on short sentences of less than three years have been released under the power of mercy. In addition, 199 long term offenders majority of whom were on life imprisonment have also been released through the grant of pardon. This has resulted in substantial cost savings for the government.

It is therefore envisaged that, by placing rehabilitated offenders who have served a significant portion of their sentence in the community through the strategies proposed in this policy, the correctional system and the taxpayer will be relieved of a significant financial burden.

Other economic benefits of implementing the policy recommendations

(a) Adoption of Multi-agency approach

This policy proposes a multi-agency approach to the implementation of the power of mercy. This is a proven cost-effective strategy that promotes collaborative synergy between stakeholders

(b) Prison overcrowding

The proposed strategies can be applied to address overcrowding in prisons without compromising on public safety

(c) Use of existing government structures

The country has extensive security and administrative machinery at national, regional, county, sub-county and grassroots level that can be mobilised to implement some of

the proposed strategies such as enhanced monitoring of released offenders with minimal cost implications.

2. Social Benefits

(a) Enhanced public safety

The adoption of a new framework for supervision and monitoring of released offenders and the revocation of the release order when conditions of release are not complied with will contribute towards improved public safety as compared to the current practice where majority of offenders are released from prison with minimal or no supervision.

(b) Resettlement and reintegration support for released offenders

By providing assistance to support resettlement as proposed in this policy, the pardoned offender has a better chance of being successfully reintegrated in the community. This will ultimately result in a reduction of the overall rate of crime

(c) Improved prison discipline

The possibility of being granted a pardon provides a strong incentive for offenders to comply with prison rules and participate in rehabilitation programmes.

(d) Improved prison rehabilitation programmes

The policy advocates for the structured early release of reformed offenders who have consistently shown good character. By adopting the proposed approach, the Prison Service will be able to free up more resources that can be used to provide quality rehabilitation and treatment programmes for hardcore criminal offenders.