



REPUBLIC OF KENYA

**REPORT OF THE TASK FORCE
ON THE
REVIEW OF THE LEGAL, POLICY AND
INSTITUTIONAL FRAMEWORK FOR
FIGHTING CORRUPTION IN KENYA**

Chairperson

Prof. Githu Muigai, E.G.H., SC

Presented to

H.E. Uhuru Kenyatta, C.G.H.

President of the Republic of Kenya and Commander-in-Chief of
the Kenya Defence Forces

October, 2015

NAIROBI

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In view of the Oath of Office that I took (as the President of this Republic), let it be known that today I draw the line. No one will stand between Kenya and what is right in the fight against corruption and other monstrous economic crimes.

H.E. Uhuru Kenyatta, C.G.H., President of the Republic of Kenya and Commander-in-Chief of the Kenya Defence Forces, in his *State of the Nation Address*, delivered in Parliament, Nairobi, on 26th March, 2015.



REPUBLIC OF KENYA

TASK FORCE ON THE REVIEW OF THE LEGAL, POLICY AND INSTITUTIONAL
FRAMEWORK FOR FIGHTING CORRUPTION IN KENYA

LETTER OF TRANSMITTAL

Date: Friday, 20th November, 2015

H.E. Uhuru Kenyatta, C.G.H.

President of the Republic of Kenya and Commander-in-Chief of
the Kenya Defence Forces

State House

NAIROBI.

Your Excellency,

**RE: REPORT OF THE TASK FORCE ON THE REVIEW OF THE LEGAL, POLICY
AND INSTITUTIONAL FRAMEWORK FOR FIGHTING CORRUPTION IN
KENYA:**

In line with the directive Your Excellency gave during the *State of the Nation Address* to Parliament, delivered on 26th March, 2015, the Attorney-General appointed the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, vide Gazette Notice No. 2118 of 30th March, 2015 (published in *The Kenya Gazette* (Special Issue) of 31st March, 2015).

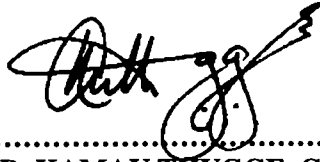
The Task Force was required to examine the legal, policy and institutional framework for fighting corruption with a view to recommending appropriate interventions for enhancing the fight against corruption in the country. The Task Force undertook its assignment diligently from April to September, 2015.

We now have the great pleasure and honour to submit our Report to Your Excellency and to thank you for the opportunity to make our humble contribution towards addressing the problem of corruption and economic crime in Kenya.

Accept, Sir, the assurances of our highest regard.

Yours faithfully,

.....
PROF. GITHU MUIGAI, E.G.H., SC
(Attorney-General)
Chairperson



.....
DR. KAMAU THUGGE, CBS
(Principal Secretary, the National Treasury)
Member

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MR. JUSTIN BUNDI, C.B.S.
(Clerk of the National Assembly)
Member



.....
MS. ANNE AMADI
(Chief Registrar of the Judiciary)
Member

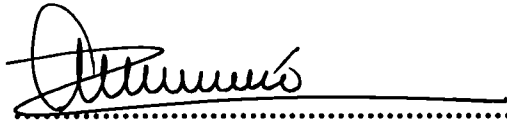


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Member

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MR. CHARLES NYACHAE
(Chairperson, Commission for the Implementation of the Constitution)
Member



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MR. KERIAKO TOBIKO, C.B.S., SC
(Director of Public Prosecutions)
Member



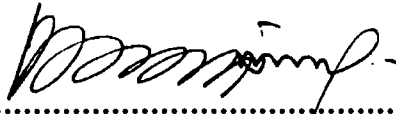
DR. OTIENDE AMOLLO, E.B.S.
(Chairperson, Commission on Administrative Justice)
Member



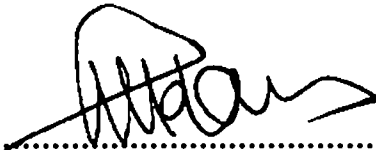
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MS. AGNES ADHIAMBO
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MR. JOSEPH KIPCHIRCHIR BOINNET, nsc (AU)
(Inspector-General of Police)
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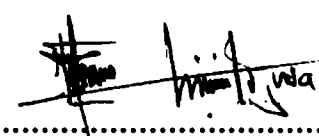


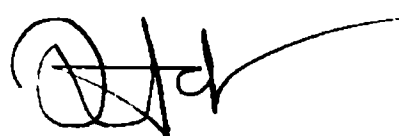
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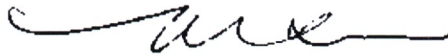

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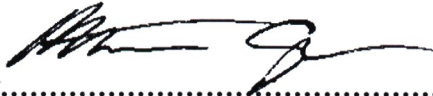

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MS. MUTHONI KIMANI, M.B.S.
(Ag. Director, Assets Recovery Agency)
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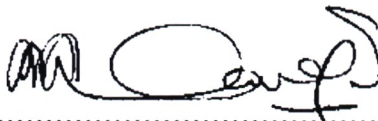
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(Chief State Counsel, Office of the Attorney-General and Department of Justice)
Joint Secretary



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MS. MARY M. WAIRAGU
(Deputy Chief State Counsel, Office of the Attorney-General and Department of Justice)
Joint Secretary

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3. The Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)
4. The Commission on Administration of Justice Act, 2011 (No. 23 of 2013)
5. The County Governments Act, 2012 (No. 17 of 2012).
6. The Criminal Procedure Code (Cap. 75 of the Laws of Kenya).
7. The Elections Act, 2011 (No. 24 of 2011).
8. The Election Campaign Financing Act, 2013 (Act No. 42 of 2013).
9. The Ethics and Anti-Corruption Commission (Amendment) Act, 2015 (No. 12 of 2015).
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14. The Fair Administrative Action Act, 2015 (No. 4 of 2015).
15. The Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011).
16. The Inter-Governmental Relations Act, 2012 (No. 2 of 2012).
17. The Judicature Act (Cap. 8 of the Laws of Kenya).
18. The Judicial Service Act, 2011 (No. 1 of 2011).
19. The Kenya Defence Forces Act, 2012 (No. 25 of 2012).
20. The Leadership and Integrity Act, 2012 (No. 19 of 2012).
21. The Mutual Legal Assistance Act, 2011 (No. 36 of 2011).
22. The National Accord and Reconciliation Act, 2008 (No. 4 of 2008).
23. The Office of the Attorney-General Act, 2012 (Act No. 49 of 2012).
24. The Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013)
25. The National Police Service Act, 2011 (No. 11A of 2011).
26. The Penal Code (Cap. 63).
27. The Political Parties Act, 2011 (No. 11 of 2011).
28. The Prevention of Corruption Act (Cap. 65) (Repealed)
29. The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009).
30. The Public Audit Act, 2003 (No. 12 of 2003).
31. Public Appointments (Parliamentary Approval) Act, 2011 (No. 33 of 2011).
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33. The Public Officer Ethics Act, 2003 (No. 4 of 2003)
34. The Public Procurement and Disposal Act, 2005 (No. 3 of 2005)
35. The Salaries and Remuneration Act, 2011 (No. 10 of 2011)
36. The Urban Areas and Cities Act, 2011 (No. 13 of 2011).
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38. The Witness Protection Act, 2006 (No. 16 of 2006).

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3. The Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulations, 2011 (Legal Notice No. 44 of 2011).
4. The Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.
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Gazette Notice No. 6707 of 19th September, 2014 (*Kenya Gazette* issue of 26th September, 2014), (Which provides the current legal framework for the work of the National Anti-Corruption Campaign Steering Committee (NACCSC)).

Gazette Notice No. 10700 of 24th July, 2013 (published in *The Kenya Gazette*, 2nd August, 2013), (Through which the Attorney-General established The National Steering Committee on the Review of the Implementation of the United Nations Convention against Corruption).

Gazette Notice Number 5826 of 21st June 2007 (*The Kenya Gazette* of 29th June, 2007) (under which the President established The Public Complaints Committee (PCSC), which was eventually replaced by the Commission on Administrative Justice (CAJ), under the Commission on Administrative Justice Act, 2011 (No. 23 of 2011).

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6. The Anti-Corruption Commission Act, 2008 (Sierra Leone)
7. The Bribery Act, 2010 (UK)
8. The Common Informers Act, 1951 (UK)
9. The Foreign Corrupt Practices Act of 1977 (of USA)
10. The False Claims Act, 31 USC No. 3729 (USA).

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1. The African Charter on Human and Peoples Rights (ACHPR)
2. The African Union Convention on Preventing and Combating Corruption (AUCPCC)
3. The Draft East African Community Protocol on Preventing and Combating Corruption
4. The International Covenant on Civil and Political Rights (ICCPR)
5. The OECD Anti-Bribery Convention
6. The Universal Declaration on Human Rights (UDHR)
7. The United Nations Convention against Corruption (UNCAC)

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8. *Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & Another* [2015] eKLR
9. *Thuita Mwangi & 3 Others v Ethics and Anti-Corruption Commission & 3 Others* [2013] eKLR.
10. *World Duty Free Company Ltd. v The Republic of Kenya* ((ICSID Case No. ARB/00/7), Washington DC, USA, 4 October, 2006).
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ABBREVIATIONS AND ACRONYMS

ACAN	Anti-Corruption Academy of Nigeria
ACECA	Anti-Corruption and Economic Crimes Act, 2003
ACHPR	African Charter on Human and Peoples Rights
ACPU	Anti-Corruption Police Unit
ADR	Alternative Dispute Resolution
AG	Attorney-General
AIDS	Acquired Immune Deficiency Syndrome
AML/CFT	Anti-Money Laundering and Combating of Financing of Terrorism
APS	Administration Police Service
ARA	Assets Recovery Agency
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
CA	Court of Appeal
CAACC	Commonwealth African Anti-Corruption Centre (Botswana)
CACCOCs	County Anti-Corruption Civilian Oversight Committees
CACMs	Community Anti-Corruption Monitors
CBF	Constituency Bursary Fund
CBK	Central Bank of Kenya
CBOs	Community Based Organisations
CDF	Constituency Development Fund
CDTF	Community Development Trust Fund
CEU	Central European University (Hungary)
CIC	Commission for the Implementation of the Constitution
CID	Criminal Investigation Department
CJ	Chief Justice
CMA	Capital Markets Authority
COG	Council of Governors
CPC	Corruption Prevention Committee
CPI	Corruption Perception Index
CPIB	Corrupt Practices Investigations Bureau (Singapore)
CPPMU	Central Planning and Project Monitoring Unit
CPSB	County Public Service Board
CPSTI	Centre for Parliamentary Studies and Training Institute
CRA	Commission for Revenue Allocation
CR	Crime Record
CRB	Credit Reference Bureau

CS	Cabinet Secretary
CSHS	Civil Servants Housing Scheme
CSOs	Civil Society Organisations
CUC	Court Users Committee
CUE	Commission for University Education
DCEC	Directorate on Corruption and Economic Crimes (Botswana)
DCI	Directorate of Criminal Investigations
DCJ	Deputy Chief Justice
DFID	Department for International Development (UK)
DG	Director General
DPP	Director of Public Prosecutions
EAC	East African Community
EACC	Ethics and Anti-Corruption Commission
EACCA	Ethics and Anti-Corruption Commission Act
ECD	Early Childhood Development
eKLR	Electronic Kenya Law Reports (www.kenyalaw.org)
EMU	Efficiency Monitoring Unit
ENA	L'Ecole Nationale d'Administration (National School of Administration), Paris, France.
ESAMI	East African Management Institute (Arusha, Tanzania).
FIU	Financial Reporting Unit
FPE	Free Primary Education
FRC	Financial Reporting Centre
FY	Financial Year
GACC	Ghana Anti-Corruption Coalition
GAP	Governance Action Plan
GDP	Gross Domestic Product
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (German Development Co-operation)
GJLOS	Governance, Justice, Law and Order Sector Reform Programme
HIV	Human Immunodeficiency Virus
HKU SPACE	Hong Kong University School of Professional and Continuing Education
IACA	International Anti-Corruption Academy
IAO	Integrity Assurance Officer
ICAC	Independent Commission against Corruption (Hong Kong SAR)
ICCPR	International Covenant on Civil and Political Rights
ICT	Information Communication Technology
IEBC	Independent Electoral and Boundaries Commission

IFF	Illicit Financial Flow
IFMIS	Integrated Financial Management Information System
IG	Inspector General (of Police)
ILI	International Law Institute
IMF	International Monetary Fund
IPCRM	Integrated Public Complaints and Referral Mechanism
IPOA	Independent Police Oversight Authority
IPPG	Inter Parties Parliamentary Group
IRA	Insurance Regulatory Authority
IRCK	Inter-Religious Council of Kenya
ISC	Inspectorate of State Corporations
JAC	Jubilee Alliance Coalition
JSC	Judicial Service Commission
JTF	Judiciary Transformation Framework
JTI	Judiciary Training Institute
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KRA	Kenya Revenue Authority
KENAO	Kenya National Audit Office
KEPSA	Kenya Private Sector Alliance
KIA	Kenya Institute of Administration
KICC	Kenyatta International Convention Centre
KICD	Kenya Institute of Curriculum Development
KIP	Kenya Integrity Plan
KIPPRA	Kenya Institute of Public Policy Research and Analysis
KIF	Kenya Integrity Forum
KLIF	Kenya Leadership and Integrity Forum
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KNHREC	Kenya National Human Rights and Equality Commission
KNICE	Kenya National Civic Education (programme)
KPS	Kenya Police Service
KSG	Kenya School of Government
KU	Kenyatta University
KUTIP	Kenya Urban Transport Infrastructure Programme
LIA	Leadership and Integrity Act
LN	Legal Notice
LSK	Law Society of Kenya

MACA	Malaysia Anti-Corruption Academy
MCA	Member of County Assembly
MDAs	Ministry, Department and Agencies
MDGs	Millennium Development Goals
MFAIT	Ministry of Foreign Affairs and International Trade
MKU	Mount Kenya University
MLA	Mutual Legal Assistance
MLACA	Mutual Legal Assistance Central Authority
MDP	Ministry of Devolution and Planning
MoEST	Ministry of Education, Science and Technology
MOJCA	Ministry of Justice and Constitutional Affairs
MOJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
MOU	Memorandum of Understanding
MP	Member of Parliament
MTP	Medium Term Plan
MMMSP	Mobile Money Service Provider
MMUST	Masinde Muliro University of Science and Technology
NACA	National Anti-Corruption Academy
NACC	National Aids Control Council
NACCSC	National Anti-Corruption Campaign Steering Committee
NACF	National Anti-Corruption Forum (South Africa)
NACP	National Anti-Corruption Plan
NARC	National Rainbow Coalition
NCAJ	National Council on Administration of Justice
NCC	National Co-ordinating Committee
NCIC	National Cohesion and Integration Commission
NCPWD	National Council of People with Disabilities
NGEC	National Gender and Equality Commission
NIP	National Integrity Plan
NSSF	National Social Security Fund
NGO	Non-Governmental Organisation
NIS	National Intelligence Service
NPS	National Police Service
NPSC	National Police Service Commission
NRB	National Registration Bureau
NSA	Non-State Actor
NYC	National Youth Council
OAG	Office of the Attorney-General

OAG&DOJ	Office of the Attorney-General and Department of Justice
OCB	Office of the Controller of Budget
ODPP	Office of the Director of Public Prosecutions
OECD	Organisation for Economic Co-operation and Development
OMS	Older Members of Society
OP	Office of the President
OVC	Orphans and Vulnerable Children
PAC	Public Accounts Committee
PBCC	Pending Bills and Closing Committee
PC	Performance Contract
PCSC	Public Complaints Standing Committee
PE	Procuring Entity
PELF	Poverty Eradication Loan Fund
PEP	Politically Exposed Person
PFMA	Public Finance Management Act
PIC	Public Investments Committee
PLWAs	People Living With AIDS
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
POEA	Public Officer Ethics Act
PPAD	Public Procurement and Asset Disposal (Bill)
PPARB	Public Procurement Administrative Review Board
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
PPOAB	Public Procurement Oversight Authority Advisory Board
PS	Principal Secretary
PSC	Public Service Commission
PSIP	Public Service Integrity Programme
PWDs	Persons with Disabilities
REPLF	Rural Electrification Programme Levy Fund
RIPA	Royal Institute of Public Administration (UK)
RMLF	Road Maintenance Levy Fund
SACCO	Savings and Credit Cooperative society
SAR	Special Administrative Area
SCAC	State Corporations Advisory Committee
SCK	Supreme Court of Kenya
SDGs	Sustainable Development Goals
SFO	Serious Fraud Office (UK)
SG	Solicitor General

SLDP	Strategic Leadership Development Programme
SOEs	State Organisations Enterprises
SRC	Salaries and Remuneration Commission
StAR	Stolen Assets Recovery (Initiative)
SULS	Strathmore University Law School
TA	Technical Assistance
TA	Transitional Authority
TI	Transparency International
TJRC	Truth, Justice and Reconciliation Commission
TNT	The National Treasury
TORs	Terms of Reference
TRAG	Transparency, Research, Advocacy and Governance
TSC	Teachers Service Commission
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UNAFEI	United Nations Asia and Far East Institute
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UON	University of Nairobi
USAID	United States Agency for International Development
WEF	Women Enterprise Fund
WPA	Witness Protection Agency
WSTF	Water Services Trust Fund
YEF	Youth Enterprise Fund

FOREWORD

On 26th March 2015, during the second *State of the Nation Address* to Parliament, H.E. the President threw down the gauntlet on corruption. In an unprecedented move, he tabled before Parliament a confidential report on corruption cases under investigation by the Ethics and Anti-Corruption Commission (EACC). He further directed all the Public officers and State officers who had been adversely mentioned in the Report to step aside pending the conclusion of investigations by EACC. Further, His Excellency directed my Office to liaise with the National Council on Administration of Justice (NCAJ) in co-ordinating efficient and speedy prosecution of the cases. And finally, the President further directed my Office to initiate a review of the legislative and policy framework for fighting corruption to ensure the effective discharge of constitutional imperatives related to integrity.

H.E. the President's action was the tipping point in a longstanding battle to restore the dignity and standing of the country's ethics and integrity record. The government's previous attempts at legislating standards of ethics and integrity had encountered stiff resistance. As a result, the country was faced with grand corruption cases impacting upon development programmes and adversely affecting the country's reputation and ranking. In recent examples, corruption within County Governments has been cited in the audit reports of the Auditor General and even those of non-state actors. Doubts have been cast about the integrity of some of the Parliamentary Oversight Committee members and the EACC itself has, in the past, been embroiled in controversies, public displays of disaffection and infighting.

Through His Excellency's singular action, the Kenyan State was presented with an opportunity to reflect and enhance its efforts and interventions against corruption. The unfettered space to: review policies, legislation, and administration on corruption and introduce near-perfect models, institutions, legislative provisions and accompanying consequences with the relative concurrence of a majority of players in both the public and private spheres. Consequently, this was a "ripe moment" in the fight against corruption. It is a chance to fix the wrongs and incorporate more rights.

It was in line with this directive that I established the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, 2010; vide Gazette Notice No. 2118 of 30th March, 2015. The Task Force undertook its assignment within a period of four months (April to September, 2015). Although it would have been desirable to give the Task Force more time, there was some urgency for the conclusion of the work of the Task Force so as to initiate the necessary reforms for enhancing the fight against corruption in the country. Consequently, the Task Force submitted an Interim Report on 29th May, 2015. Further, in June, 2015, the Task Force submitted to the National Assembly, a number of proposed amendments to the EACC Act for purposes of addressing urgent issues relating to the structure and composition of EACC.

The Task Force solicited and received memorandums from member institutions, public organisations, civil society organizations and select individuals. Thus, even without fully-fledged public hearings, the Task Force was able to consider and analyse documentation and proposals on the appropriate mechanisms for enhancing the fight against corruption in Kenya. At the same time, the Task Force considered various best practices and anti-corruption models from a number of jurisdictions, such as Australia; Botswana; China; Denmark; France; Ghana; Hong Kong Special Administrative Area (SAR); Italy; Malaysia; Mauritius; Nigeria; Norway; Romania; Rwanda; Sierra Leone; Singapore; South Africa; Sweden; Tanzania; Uganda; the United Kingdom (UK), and the United States of America (USA), among other countries.

The Task Force has explored what ails our governance and anti-corruption agenda. We have undertaken introspection into the institutions that are mandated with the fight against corruption and further assessed the social, political and economic contexts that drive

corruption. On this basis, we have reviewed our policy, legislative and institutional structures as currently-designed and evaluated their responsiveness to the corruption problem. Our self-reflection did not shy away from tackling the hard questions, making radical propositions, reconstituting structures or revising mandates. The result of this effort is the hallmark of our collective implementation strategy going forward.

Critical to this observation has been the obvious disregard and/or subservience of our cherished shared values including integrity, fairness, honesty, excellence, respect and discipline as part of our nation's identity kit. These values are not engrained and/or have been eroded in our personal or public interactions as a people. This is despite the fact that of all the enabler elements identified in the Kenya Vision 2030 strategy, adherence to our national values and ethics is a critical cornerstone to achieving the global competitiveness and prosperity we aspire to. The same is re-emphasized in Article 10 (National Values and Principles of Governance), Article 232 (Values and Principles of Public Service) and Chapter 6 (Leadership and Integrity) of our Constitution. It is, therefore, imperative that our fundamental grounding and national psyche as a country is re-energized towards values and ethics.

The responsibility of moulding a national culture imbued with values is a responsibility not just for the government, but of every single Kenyan. It is, therefore, imperative for us to reflect on our institutional and personal responsibility, and more importantly, to identify specific and measurable commitments to action that we shall individually, and institutionally be responsible for. These concerns have been duly considered by the Task Force, and measures proposed for entrenching the same from the latent years of life, through to education system, social structures, productive and retirement stages of our individual lives as citizens of the Republic. In terms of the implementation of the proposals contained in this Report, the Task Force has recommended the constitution of an Inter-Agency Committee to monitor the implementation of the Report, with the membership drawn from both state and non-state actor representatives.

The Task Force is confident that the Government is willing and able to root out corruption once and for all, and trusts that this Report will make a useful contribution to the Government's anti-corruption agenda. It is our candid hope and conviction that the implementation of this Report will contribute towards actualising the aspirations of all Kenyans as set out in the Preamble to the Constitution of Kenya, 2010, of "...a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law". Through that, we will have actualized the dreams of those who heroically fought for our independence while accelerating the realisation of our Kenya Vision 2030 goals - for the benefit of our current generation and our posterity. In effect, Kenya will have played its role and taken the pride of place towards the attainment of the Sustainable Development Goals (SDGs) adopted by the UN General Assembly on 25th September, 2015.



PROF. GITHU MUIGAI, EGH, SC
(Attorney-General)
Chairperson,

*Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting
Corruption in Kenya*

October, 2015.

ACKNOWLEDGEMENTS

The Task Force is much obliged to a number of persons and institutions whose support made the arduous work of the Task Force much bearable.

First and foremost, I would like to thank H.E. President Uhuru Kenyatta, C.G.H., for commissioning the Office of Attorney-General and Department of Justice to undertake this assignment. This being the first time the Government is undertaking such an initiative is a clear testimony of political will on the part of H.E. the President, to engage in a focused onslaught on corruption and economic crime.

Secondly, the Task Force is indebted to the Chief of Staff and Head of Public Service, Mr. Joseph K. Kinyua, C.B.S., whose *Strategies to Combat Corruption in 2015* initiative provided useful information and impetus to the execution of assignment of the Task Force. In the same vein, we are grateful to the staff in the Presidency, particularly Mr. Abdikadir Mohammed (Presidential Advisor on Constitutional Affairs), as well as Mr. Jasper Mbiuki, and Mr. Peter Kariuki, for their insightful proposals on the assignment.

Thirdly, the Task Force would like to express deep gratitude to the Cabinet Secretary, National Treasury (Mr. Henry Rotich, E.G.H.), and his Principal Secretary (Dr. Kamau Thugge, C.B.S.), and the Secretary/Chief Executive of the Ethics and Anti-Corruption Commission (EACC) (Mr. Halakhe Waqo), who placed at our disposal the necessary human and financial resources as well as physical facilities, for purposes of ensuring timely execution of the work of the Task Force.

In addition, the Task Force is deeply indebted to the Task Force Members¹, Joint Secretaries, and Technical Committee Members. We are particularly grateful to the Joint Secretaries – Mr. John Kithome Tuta, HSC, and Ms. Mary M. Wairagu, for going beyond the call of duty to provide the necessary support in preparing the background documentation and logistics for the work of the Task Force. We are equally grateful to a number of consultants who rendered chivalrous service, sometimes gratuitously, towards the realization of the objectives of the Task Force, namely: Mr. Justice Aaron Ringera, E.B.S.; Mr. Gichira Kibara, C.B.S.; Prof. PLO Lumumba; Dr. David Ndi; Prof. W. Kulundu Bitonye, E.B.S., and Dr. Ludeki Chweya, C.B.S.

Equally, we are grateful for the excellent technical support provided by members of the Technical Committee composed of the Joint Secretaries and the following members:-Ms. Mary Ann Njau-Kimani, O.G.W. (Secretary, Justice and Constitutional Affairs, OAG&DOJ); Ms. Wanjiku Wakogi (Governance Advisor, OAG&DOJ); Mr. Silas Mc'Opiyo, E.B.S., O.G.W. (Assistant Inspector-General, National Police Service); Patrick Mugo Muhuni (Staff Officer/Quality Services and Standards, Directorate of Criminal Investigations (DCI)); Ms. Emily Kamau (Senior Assistant Director Public Prosecutions, Officer of Directorate of Public Prosecutions (ODPP)); Mr. Duncan Okello (Chief of Staff, Office of the Chief Justice, Judiciary); Mr. Joseph Were (Principal Magistrate, Office of the Chief Registrar, Judiciary); Mr. James Manyonge (Company Secretary & Head of Legal and Policy, Financial Reporting Centre (FRC)); Ms. Carol Wathoa (Legal & Compliance Advisor, FRC); Ms. Dorothy M. Ikiara (Senior Analyst, FRC); Mr. Naphtaly K. Rono (Legal Officer, National Intelligence Service (NIS)); Mr. Edwin Rioba (Legal Officer, NIS); Mr. David K. Too (Director, Legal Services, EACC); Mr. Joseph Mutuma Mutwiri (Deputy Director, Budget, the National Treasury); Mr. George W. Tuti (Legal Officer, Office of the Controller of Budget); Mr. Lamech B. Achika (Director of Audit, Office of the Auditor-General); Mr. Vincent Chahale (Legal & Advisory Manager, Commission on Administrative Justice (CAJ)); Ms. Jane W. Njoroge (General Manager, Technical Services, Public Procurement Oversight Authority

¹ Mr. Mumo Matemu, M.B.S., who was a Member of the Task Force and Chairperson of the Ethics and Anti-Corruption Commission (EACC) at the time of the commencement of the work of the Task Force, resigned from EACC on 12th May, 2015.

(PPOA)); Mr. Peter K. Ndung'u (Manager, Policy and Research, PPOA) and Ms. Evaline Rono (Ag. Programme Officer, Research and Advocacy, National Anti-Corruption Campaign Steering Committee (NACCSC)).

Other members of the Technical Committee were: Ms. Praxedes Tororey (Director, Legal and Public Affairs, Independent Electoral and Boundaries Commission (IEBC)); Mr. Vincent Okong'o (Director, Preventive Services, EACC); Mr. Julius Muraya (Deputy Director, Preliminary Investigations and Asset Tracing, EACC); Ms. Emily Chege (Deputy Director Prevention, EACC); Mr. Humphrey Mahiva (Deputy Director, Intelligence and Operations, EACC); Ms. Olga Sewe (former Deputy Director, Litigation, Asset Recovery & Legal Support, EACC); Mr. David Kaboro (Senior Legal Officer/Personal Assistant to the Secretary/Chief Executive, EACC); Ms. Farida Kokita (Partnerships Officer, Kenya Leadership and Integrity Forum (KLIF)/EACC); Mr. Joash O. Dache, M.B.S. (Secretary/Chief Executive, Kenya Law Reform Commission (KLRC)); Mr. Peter M. Musyimi, H.S.C. (Principal Legal Officer, KLRC); Mr. Francis Maina (Ag. Director, Governance, Justice, Law and Order Sector Reform Programme ((GJLOS), OAG&DOJ)); Ms. Belinda Kiilu (Principal State Counsel, OAG&DOJ); Mr. Hussein Abdullahi (Communications Specialist, OAG&DOJ); Mr. Tom Odede (State Counsel, OAG&DOJ); Ms. Sophia Otieno (Legal Officer, Parliamentary Service Commission); Mr. Patrick Owiny (Deputy Director, Ethics Monitoring and Compliance, EACC); Ms. Sophie Mwai (Prevention Officer, EACC); Mr. Derrick Kaisha (Ethics Officer, EACC); Mr. Peter M. Mwangi (Deputy Director, Operations, Witness Protection Agency (WPA)); Mr. Joel Amenya Omari (Senior Legal Officer, WPA); Mr. Teddy Musiga (Legal Researcher, National Council on Law Reporting); Ms. Carole Nyaga (State Counsel, OAG&DOJ); Mr. David Wanjohi (Legal Officer, Council of Governors (COG)); Mr. Peter Ngumi Noah (Litigation Counsel, OAG&DOJ); Ms. Muthoni Kanyugo (Legal Researcher, OAG&DOJ); Ms. Cynthia N. Gichuki (Legal Researcher, OAG & DOJ) and Ms. Nancy Warugongo (Legal Researcher, OAG & DOJ).

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Needless to say, we acknowledge with gratitude the submissions made by a number of public, academic, civil society and non-state actor organizations, such as: the Kenya National Commission on Human Rights; the Kenya School of Law; the Law Society of Kenya (LSK); Transparency International (Kenya Chapter); Strathmore University Law School (SULS); Society for International Development (SID) and the Ufungamano Joint Forum of Religious Organisations, among others. We are also thankful to individual citizens whose contributions through memorandums or various proposals to the Task Force contributed to the reform proposals contained in the Report. Equally, we appreciate a critique on the Draft Report provided by Mr. Samuel Kimeu (TI-K); Dr. Luis Franceschi (SULS); Prof. Charles Sampford (Institute for Ethics, Governance and Law (Australia)); Prof. Karuti Kanyinga (University of Nairobi) and Mr. Irungu Houghton (SID), among others.

Granted that the Task Force was required to consider best practices in the fight against corruption from various jurisdictions, the Task Force benefitted immensely from information and documentation provided by the Embassy/Parliament Mission of the Republic of Kenya, Vienna, Austria. For that, we are much obliged to Mr. Michael Oyugi (Ambassador/

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In general, I thank everyone who directly or indirectly toiled and moiled for the success of the work of the Task Force. It is my candid hope and conviction that their efforts will be compensated through the implementation of the recommendations of the Task Force.



NJEE MUTURI

Solicitor-General

Office of the Attorney-General and Department of Justice

October, 2015

EXECUTIVE SUMMARY

Over the last twenty years, since the end of the Cold War, corruption has been an issue of major concern at national, regional and international levels. The end of the Cold War ushered in an era of liberalism with concomitant demands for good governance. In Kenya and many other developing countries, good governance reforms have enhanced constitutionalism, respect for human rights, democracy, transparency, accountability and economic liberalization. At the same time, there has also been a protracted debate as to how to balance between the need to effectively combat corruption and the respect for the rights of suspects.

In Kenya, the 1990s were characterised by demands for a new constitutional and political order, which culminated in the adoption of a multi-party system of Government in 1991; the establishment of an Anti-Corruption Police Squad in 1992; agitation for and subsequent adoption of some minimum legal, political and constitutional reforms through the Inter Parties Parliamentary Group (IPPG) in 1997 and the establishment of the Kenya Anti-Corruption Authority (KACA) in 1997. During this period, there was intense pressure from development partners, particularly the World Bank and International Monetary Fund (IMF), as well as bilateral partners, professional organizations, the academia, local civil society organizations and the clergy, for the Government to put in place effective anti-corruption laws, policies and institutions.

The first decade of the 21st century witnessed far-reaching governance, constitutional, legal and political reforms aimed at creating a more democratic and accountable state. Some of the significant changes witnessed during this era are: radical reforms in the Judiciary and the Civil Service in 2003; the enactment of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) (ACECA), and the Public Officer Ethics Act, 2003 (No. 4 of 2003) (POEA); the establishment of the Kenya Anti-Corruption Commission (KACC) in May, 2003 and the National Anti-Corruption Campaign Steering Committee (NACCSC) in July, 2004; the signing of the African Union Convention on Preventing and Combating Corruption (AUCPCC) in July, 2003; the ratification of the United Nations Convention against Corruption (UNCAC) on 9th December, 2003; the rolling-out of the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme in 2003/2004; implementation of financial sector and legal reforms (2006/2007), and the promotion of national cohesion and integration following the 2007/2008 Post-Election crisis.

The year 2010 witnessed unprecedented legal, political and social reforms in the country. Following the adoption of a new Constitution of Kenya on 27 August, 2010, a number of significant changes have been put in place, such as: the establishment of the Commission for the Implementation of the Constitution (CIC) to oversee the implementation of the Constitution; the adoption of an open recruitment system for the Chief Justice, Deputy Chief Justice, judges and magistrates; the establishment of the Ethics and Anti-Corruption Commission; the Commission on Administrative Justice; the Office of the Auditor-General, the Office of the Controller of Budget, and the Office of the Director of Public Prosecutions, among other constitutional commissions and independent offices; the enactment of the Leadership and Integrity Act, 2012 (No. 19 of 2012), and the establishment of county governments following the 2013 general elections, among other significant reforms.

Nevertheless and in spite of the many anti-corruption initiatives Kenya has put in place, corruption has remained rampant and Kenya's ranking in international corruption perception surveys has remained poor. It was because of this state of affairs that H.E. the President decided to lead the war against corruption from the front in his *Second State of the Nation Address* to Parliament (and to the nation) on 26th March, 2015, during which address he, *inter alia*, denounced the corrupt conduct of some State officers and public officers, and directed that they step aside to pave way for investigations. In the same breath, he directed the Office

of Attorney-General and Department of Justice to co-ordinate a comprehensive review of the legal, policy and institutional framework for fighting corruption in Kenya, with a view to strengthening the anti-corruption instruments of the state. It was in line with this directive that the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, was established by the Attorney-General, vide Gazette Notice No. 2118 of 30th March, 2015.

While carrying out its assignment, the Task Force established a close correlation between unfettered exercise of discretionary power and corruption. Reviews of the circumstances surrounding most of the scandals which have bedevilled this country since independence, such as Goldenberg Affair, Anglo-Leasing, Triton and Free Primary Education, among others, confirm this relationship. Thus, going forward, the fight against corruption should be about decreasing monopoly of power and discretion and increasing transparency and accountability in the management of public affairs.

The Task Force noted that Kenya has a very elaborate legal and institutional framework for fighting corruption. In terms of institutional arrangements for fighting corruption, Kenya has dedicated anti-corruption bodies, such as: EACC, and NACCSC. In addition, Kenya has a plethora of other institutions which play a complementary role in the fight against corruption.

In terms of the legal instruments for fighting corruption, the Task Force noted that Kenya has most of laws required for effective onslaught on corruption but their enforcement has been somewhat lacklustre. Considering Kenya's strong democratic culture and going by the standards set out under the UNCAC, and AUCPCC, among other anti-corruption instruments, Kenya's anti-corruption regime compares favourably with the best anti-corruption models in the world. Besides the Constitution of Kenya, the Task Force identified a number of legal instruments which directly or indirectly facilitate the fight corruption, such as: ACECA; the Ethics and Anti-Corruption Commission Act, 2011; POEA; the Public Procurement and Disposal Act, 2005 (PPDA); the Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009) (POCAMLA); the Leadership and Integrity Act, 2012(LIA); the Elections Act, 2011 (No. 24 of 2011); the Mutual Legal Assistance Act, 2011 (No. 36 of 2011); the Commission on Administration of Justice Act, 2001 (No. 23 of 2011), and the Fair Administrative Action Act, 2015 (No. 4 of 2015), among others.

Nonetheless, the Task Force recommends a number of legislative amendments to strengthen the legal framework for fighting corruption. These include:- enactment of new legislation to address some gaps in the fight against corruption; specific amendments to various pieces of legislation to sanction private sector enterprise participants in public sector corruption; criminalization of certain acts of corruption, such as illicit enrichment; mechanisms for carrying out lifestyle audits of public officers; designation of EACC as the central depository of all financial declarations of State officers; establishment of an elaborate framework for vetting of State officers seeking election, and adoption of mechanisms for the "stepping-aside" of State officers who are under active investigation (by EACC) over corruption and other crimes, among other proposals.

The Task Force noted that there was an urgent need to address the issue of the management and structure of EACC. In particular, the Task Force noted that EACC was operating sub-optimally due to conflicts between its policy organ (Chairperson and Members) and the Secretariat (led by the Secretary/Chief Executive Officer). Even though the Chairperson and Members eventually resigned in April/May, 2015, the Task Force felt that there was need to separate the policy organ of the Commission from its executive (Secretariat) arm. Consequently, a number of proposed amendments were passed on to the National Assembly for consideration, especially in relation to: the conversion of the Chairperson and Members of EACC from full-time to part-time status, and to give the Secretary/Chief Executive more

executive powers, and a security of tenure to enable him to discharge his duties without fear or favour. Some of the proposed were eventually adopted by the National Assembly while others are still under consideration.

It was noted that in as much as the country needs dedicated anti-corruption agencies, it is imperative that a holistic emphasis and facilitation on the full spectrum justice chain is undertaken in order to have an effective and sustained anti-corruption outcome. The Task Force identified the paramountcy of ensuring that the traditional justice sector and law enforcement agencies are provided with sufficient financial and human resources to discharge their roles. Some of the traditional law enforcement agencies include: the Office of Attorney-General and Department of Justice (OAG&DOJ); Office of Director of Public Prosecutions (ODPP); the Judiciary; the National Police Service (NPS); the Directorate of Criminal Investigations (DCI); the Office of the Auditor-General; the Office of the Controller of Budget; the Department of Internal Audit (National Treasury); the Inspectorate of State Corporations; the Efficiency Monitoring Unit (EMU), and the watchdog committees of Parliament (Parliamentary Accounts Committee (PAC), and the Public Investments Committee (PIC)), among others, whose operational protocols must of necessity be intricately synergized.

The need for a dedicated policy framework to support the fight against corruption cannot be gainsaid. The Task Force considered the draft National Ethics and Anti-Corruption Policy (April, 2015) developed by OAG&DOJ, with support from EACC, ODPP, the Judiciary, and other stakeholders. The Task Force hopes that this Report will provide the necessary content and impetus for the finalization of the Policy, to provide a long-range approach to fighting corruption.

It goes without saying that political will is critical to successful fight against corruption and unethical practices. Thus, there is an urgent need for the fight against corruption to be supported at the highest political level. While this has been evidently provided by H.E. the President, there is need for this political will to be emulated and cascaded to all levels of Government, including but not limited to the Cabinet, Parliament, the Judiciary, MDAs, and the 47 counties of the Republic. To sustain this political will and the national dialogue on the fight against corruption, the Task Force recommends that the Presidency, OAG&DOJ, and EACC, among other stakeholders, should convene regular forums on the fight against corruption and the enhancement of ethics and integrity, especially among State officers and public officers. It is recommended that the Kenya Leadership and Integrity Forum (KLIF), which brings together about fourteen sectors drawn from the Executive, Parliament, Judiciary, EACC, law enforcement agencies, watchdog agencies, private sector, the media, professional organizations, civil society, trade unions, religious organizations, constitutional commissions and independent offices, and the Council of Governors, among other sectors, should be strengthened through appropriate policy and legislative instruments so that it (KLIF) may become the focal point for intra-governmental, inter-governmental and cross-sectoral dialogue over the planning, implementation and reporting on the implementation of various anti-corruption measures.

The Task Force appreciates that this is the first time that Kenya has undertaken a thorough review of its anti-corruption regime. Certainly, within the given time-frame, the Task Force could not exhaustively attend to all issues touching on the appropriate legal, policy and institutional reforms necessary for addressing what ails the fight against corruption in Kenya. As such, the Task Force recommends that an Inter-Agency Committee under the chairmanship of the Attorney-General be established to monitor the implementation of the Report. Members of the Committee would be drawn from the heads of various target institutions in the state and non-state sectors. Besides overseeing the implementation of this Report, the Committee will work towards addressing any emerging challenges that encumber the fight against corruption,

and assessing the efficacy or otherwise of the anti-corruption measures the country has put in place. The Committee will be meeting monthly to monitor the implementation of the recommendations of the Report, and will be reporting to H.E. the President on a quarterly basis.

In summary, the Task Force Report outline is as follows:-

Chapter One of the Report gives an Introduction to the work of the Task Force and briefly narrates the process undertaken to reach the conclusions and recommendations set out in the Report.

Chapter Two focuses on the Background to the issues that the Task Force was investigating and the thematic areas under which it examined the Terms of Reference (TORs) of the Task Force.

Chapter Three focuses on the legal, policy and institutional arrangements for fighting corruption in Kenya. This Chapter examines the various institutions put in place for fighting corruption in Kenya. Article 79 and Chapter Fifteen of the Constitution establishes the Ethics and Anti-Corruption Commission (EACC) which is the national dedicated anti-corruption body. The EACC fights corruption through four main strategies: enforcement (investigations), prevention, public education and asset recovery. Besides EACC, the other bodies which play a critical role in the fight against corruption are: ODPP and the Judiciary (Special Magistrates). ODPP prosecutes the corruption and economic crime matters investigated by EACC. On its part, the Judiciary (through the institution of the Special Magistrates) adjudicates over corruption and economic crime cases. In line with the *Organisation of the Government of Kenya* (Presidential Executive Order No. 2 of 2013), OAG&DOJ provides the necessary policy guidance over the development of appropriate anti-corruption laws and policies and co-ordination of the implementation of various anti-corruption strategies in the Government.

There are also other institutions which play a critical but complementary role in the fight against corruption. These are: the Office of the Auditor-General; the Office of the Controller of Budget; the National Treasury; IEBC; Parliament; CAJ; NACCSC; the National Police Service; NIS; DCI; the Mutual Legal Assistance Central Authority (MLACA); PPOA; the Assets Recovery Agency (ARA); FRC, and the Witness Protection Agency (WPA), among others.

Chapter Four builds on the institutional arrangements for fighting corruption highlighted in Chapter Three and focuses on the key strategies necessary for enhancing the fight against corruption in Kenya. This Chapter highlights anti-corruption strategies based on principles or best practices drawn from, the Constitution, the Draft National Ethics and Anti-Corruption Policy, international and regional anti-corruption instruments such as UNCAC, AUCPCC and inference from other countries worldwide. Reference has also been drawn from memorandums received from different organizations, past experience, best practices, successes and challenges faced in the fight against corruption in Kenya and other jurisdictions. The strategies are set out in ten broad areas, namely: prevention; education, training and public awareness; criminalisation; investigations; prosecution; adjudication; asset recovery; international co-operation, social accountability and *qui tam* actions, and leadership and integrity.

Chapter Five explores the issue of fighting corruption in the devolved system of Government in Kenya. The devolved system of government is established under Chapter Eleven of the Constitution, 2010 and is expected that it will be one of the main drivers of development, poverty eradication and the realisation of Kenya Vision 2030 goals. Corruption and unethical conduct have been identified as some of the threats to the realisation of the objects of devolution and the goals of Kenya Vision 2030. Studies undertaken by EACC show that corruption is becoming a major concern in the devolved system of government and that the

corruption prevalence rate in all the 47 counties ranges from 1% to 3.5%.² EACC surveys suggest that corruption in the county governments is most prevalent in the areas of public procurement and disposal, public financial management, human resource management and revenue collection. Weaknesses in capacity-building of various county government institutions and general service delivery have each contributed towards the emergence of corruption in the counties.

Chapter Six deals with institutional collaboration and partnerships. Institutional collaboration largely enhances the fight against corruption. These platforms are instrumental in the fight against corruption in areas such as reporting corruption, sharing of information, intelligence and data, co-operation in investigations, prosecution, and expeditious disposal of cases, sensitization, awareness and advocacy, and joint trainings, among other areas. The Chapter explores a number of areas that require technical assistance for purposes of enhancing the fight against corruption.

Chapter Seven deals with institutional arrangements for training and capacity-building in the fight against corruption. It addresses Paragraph 3(h) of the TORs of the Task Force, which required the Task Force to, “*Consider and propose appropriate institutional arrangements for training and capacity-building on anti-corruption, ethics and integrity for key anti-corruption agencies and other public officers generally*”. The Chapter notes that training and capacity-building are a key plank in the fight against corruption. The core objective of training and capacity-building is to impart the requisite skills, knowledge and attitudes on the fight against corruption. The Chapter concludes with a recommendation on the establishment of a National Anti-Corruption Academy (NACA) to ensure well co-ordinated training programme on anti-corruption, ethics and integrity for Kenyans, the African region and beyond.

Chapter Eight addresses issues of technical assistance (TA) for purposes of enhancing the fight against corruption in Kenya. As such, the Chapter focuses on the key technical needs of various anti-corruption bodies. The Task Force benchmarked the TA needs with the provisions of the UN Convention against Corruption, which contains some international best practices and principles on the provision of TA. In the same breath, the Chapter analyses the TA needs identified in the Draft UNCAC Review Report of Kenya (September, 2015), which had solicited information from all anti-corruption bodies during the review period (2013-2015). The TA needs are aimed at addressing the challenges identified in the execution of various anti-corruption strategies, such as: criminalization; enforcement; prevention; public education, and prosecution, among others. The Chapter concludes by recommending a sectoral approach towards the provision of TA and further suggests that TA should be demand-driven and not supply-driven, and must adhere to the Constitutional principles of Kenya.

Chapter Nine of the Report focuses on the proposed legislative interventions. The Task Force has made far-reaching recommendations on the measures necessary towards strengthening the legal, policy and institutional anti-corruption framework in the country. The next necessary step towards implementation of the recommendations is to have those that require to be anchored in the law be considered and effected through legislative interventions. This is the focus of Chapter Nine of this Report. Firstly, the chapter presents an overview of the proposed changes in the existing legal framework through amendments in order to align the laws with the Task Force proposals. A consolidated appendix of the actual statutes recommended for amendment, setting out each of the provisions earmarked for amendment is presented in **Appendix 1** of this Report. Secondly, it analyses the provisions on pending bills that are yet to be made into law, in order to identify areas that may need to be reviewed before their enactment. Lastly, the chapter looks into areas where the country has not embarked on

² Ethics and Anti-Corruption Commission: *Ethics and Corruption Survey, 2014* (Nairobi, 2014).

legislation but which are deemed necessary to have legislation to govern various aspects of anti-corruption.

Chapter Ten provides the Conclusion to the Report. It contains a summary of some of the main issues which were under consideration and the conclusion of the Task Force on the same. It seeks to show that Kenya has generally done well in terms of putting in place the requisite laws, policies and institutional arrangements for fighting corruption. Nonetheless, more needs to be done in terms of ensuring effective enforcement of the existing laws and policies and providing results for the investment Kenyans have put in various anti-corruption and good governance institutions. All in all, the Chapter concludes by noting that fighting corruption is a process but not an event, hence the need for concerted efforts by all concerned parties to adopt a long-haul approach to fighting corruption and promoting ethics and integrity in Kenya.

CHAPTER ONE: GENERAL INTRODUCTION AND OVERVIEW

1.1 Introduction

This is the Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, appointed by the Attorney-General (AG) (and the Chairperson of the Task Force) on 30th March, 2015. The Task Force was established vide Gazette Notice No. 2118 of 30th March, 2015³ (hereinafter referred to as Gazette Notice No. 2118). The Task Force was inaugurated by the AG at the Office of the Attorney-General and Department of Justice (OAG & DOJ), on Wednesday, 8th April, 2015.

1.2 Background

On 30th March, 2015, the AG established the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, whose main mandate was to undertake a thorough study of the legal, policy, and institutional framework for fighting corruption in Kenya. The establishment of the Task Force came against the backdrop of concerted efforts of the Government, under the patronage of His Excellency the President, to strengthen the institutional and legal regime for fighting corruption so as to ensure zero tolerance to corruption in the country, and particularly in the management of public affairs.

In his *State of the Nation Address* delivered in Parliament on 26th March, 2015, the President gave a number of directives geared towards enhancing the fight against corruption in the country. Among other things, the President directed that 175 senior public officers (mainly State officers), including five Cabinet Secretaries, who were under investigation by the EACC step aside for a period of sixty days to allow for full investigations into the allegations levelled against them. In addition, the President directed the AG to co-ordinate efforts towards a comprehensive review of the legal, policy and institutional framework for fighting corruption in order to ensure that the country has the requisite infrastructure and tools to fight corruption in all its facets.

Prior to these events, it will be recalled that on 6th March, 2015, the President issued Executive Order No. 6 (*Ethics and Integrity in the Public Service*)⁴, warning all public officers and institutions against being involved in any form of corruption. Earlier on, in his 2015 *New Year Address to the Nation*, the President had called upon Kenyans to stand out against corruption and promised enhanced measures geared towards preventing and combating corruption.

Besides the Presidential directives, the key institutions involved in the fight against corruption, such as EACC, ODPP, the Judiciary, and the OAG&DOJ, have been playing diverse roles geared towards ridding the country of corruption. These efforts have, however, been hampered by a number of legal, policy and institutional bottlenecks, thereby compromising the realisation of goals towards combating corruption. The constraints faced in the fight against corruption have been partly identified in a number of the anti-corruption initiatives that Kenya has been involved in. Some of those initiatives include but are not limited to the ongoing review of the implementation of the United Nations Convention against Corruption (UNCAC), and the AU Convention on Preventing and Combating Corruption (AUCPCC), as well as the on-going development of a National Ethics and Anti-Corruption Policy.

The UNCAC review Report in Kenya has focused on the implementation of Chapter 3 (Criminalization and Law Enforcement) and Chapter 4 (International Co-operation). The review is being undertaken by Cabo Verde and Papua New Guinea, with Secretariat support being provided by the United Nations Office on Drugs and Crime (UNODC). The Report is

³ See: *The Kenya Gazette* (Special Issue), 31st March, 2015.

⁴ H.E. President Uhuru Kenyatta, CGH, *Ethics and Integrity in the Public Service* (Executive Order No. 6 of 6th March, 2015 (The Presidency: Nairobi, March, 2015)).

expected to be completed in time for the sixth Session of the UNCAC conference of State Parties (UNCAC COSP-6), set to be held in St. Petersburg, Russian Federation, 2-6 November, 2015. It is a requirement under the UNCAC initiative that every State Party undertakes a review of the implementation of the Convention once every five years.

And with regard to the development of a National Ethics and Anti-Corruption Policy, a Draft Policy has been developed. It is expected that the Draft Policy will be finalised in 2015/2016 after validation by stakeholders. Both the draft UNCAC Country Report and the Draft National Ethics and Anti-Corruption Policy formed part of the reference documents considered by the Task Force in line with Paragraph 3(e) and (d) of the TORs of the Task Force.

1.3 Terms of Reference of the Task Force

Paragraph 3 of Gazette Notice No. 2118,⁵ under which the Task Force was established, sets out the Terms of Reference of the Task Force as follows:-

3. *The Terms of Reference for the Task Force shall be to:-*
 - (a) *Review the legal, policy and institutional framework for fighting corruption in Kenya;*
 - (b) *Propose appropriate reforms to the legal, policy and institutional framework for fighting corruption and promoting ethics and integrity;*
 - (c) *Propose appropriate amendments to various legal instruments with a view to strengthening the legal and institutional framework for fighting corruption;*
 - (d) *Examine the organizational structures of the key anti-corruption agencies with a view to providing clear separation between the policy and operational roles of such entities;*
 - (e) *Consider and propose appropriate mechanisms for collaboration and co-operation among the institutions involved in the fight against corruption;*
 - (f) *Consider and propose appropriate mechanisms for preventing and combating corruption in the devolved system of Government and in the management of devolved funds;*
 - (g) *Consider the role of Non-State Actors, such as religious organizations, civil society, media, and the private sector in the fight against corruption;*
 - (h) *Consider and propose appropriate institutional arrangements for training and capacity-building on anti-corruption, ethics and integrity for key anti-corruption agencies and other public officers generally;*
 - (i) *Identify international or regional best practices in the fight against corruption;*
 - (j) *Consider proposals for technical assistance for the institutions involved in preventing and combating corruption;*
 - (k) *Prepare a report on the necessary legal, policy and institutional reforms necessary for effective fight against corruption;*
 - (l) *Carry out such other functions as may be necessary or incidental to the foregoing.*

⁵The Kenya Gazette (Special Issue), 31st March, 2015 (*supra*, f.n.3).

Paragraph 4 gives guidance on the modalities of doing business by the Task Force. It states that:-

4. In the performance of its tasks under paragraph 3, the Task Force -

- (a) shall consult with key stakeholders in the fight against corruption, such as: the Ethics and Anti-Corruption Commission; the Office of the Director of Public Prosecutions, and the Judiciary, among others;*
- (b) shall hold such number of meetings in the places and at such times as the Task Force shall consider necessary for the proper discharge of its functions;*
- (c) may co-opt any person(s) as it may consider necessary or expedient for the proper performance of its functions;*
- (d) may consider reports of past or on-going initiatives towards enhancing the legal, policy and institutional framework for fighting corruption;*
- (e) may use reports prepared pursuant to the review of implementation of some international instruments that Kenya is a State Party to, such as: the United Nations Convention against Corruption, and the African Union Convention on Preventing and Combating Corruption;*
- (f) may cause to be carried out such studies or research as may inform the Task Force on its mandate;*
- (g) may have all powers necessary or expedient for the proper execution of its functions, including the power to regulate its own procedures; and,*
- (h) May create Committees or sub-committees to expedite the discharge of its tasks.*

1.4 Methodology

In order to carry out its mandate the Task Force undertook the following initial activities:

- a) Establishment of a Secretariat to carry out the administrative and logistical aspects of its mandate: The Secretariat comprised the Joint Secretaries, technical officers and support staff from OAG&DOJ. Additionally, EACC assigned six of its officers to provide various forms of technical support to the Secretariat from time to time.*
- b) Establishment of a Technical Committee of the Task Force comprising senior officers from the relevant Ministries, Departments and Agencies (MDAs) to provide background information and documentation to the Task Force: The Committee was constituted following the resolutions of the 2nd Meeting of the Task Force held on 21st April, 2015. Subsequently, the Committee established Thematic Groups to undertake detailed examination of the issues which were under consideration by the Task Force.*
- c) Holding an Induction Workshop for members of the Task Force for the interpretation of the Terms of Reference (TORs) and to sensitise the members of the Task Force on the TORs of the Task Force and the expected outputs of the Task Force: An Induction Workshop for the Task Force was held at the Kenya School of Law, Karen on 27th April, 2015.*
- d) Promulgation of operational rules of the Task Force and other rules of engagement: At its 2nd Meeting held on 21st April, 2015, the Task Force adopted some basic rules to guide its work.*
- e) Solicitation of memorandums from key stakeholders in the fight against corruption: The Task Force resolved that since most of the issues affecting the fight against*

corruption were a matter of public notoriety, priority would be given to the core institutions involved in the fight against corruption, in terms of the consideration of their proposals. As such, all Member institutions of the Task Force were invited to submit memorandums to the Task Force. Memorandums were also received from other public institutions, civil society organisations and even private citizens. A list of the institutions which submitted memorandums to the Task Force is appended to this Report (Appendix Four).

- f) *Examination of a Concept Paper prepared by the Secretariat setting out the context within which corruption is being fought in Kenya and the expected outputs of the Task Force:* The Secretariat prepared a Concept Paper, which gave a brief overview of the current legal, policy and institutional framework for fighting corruption in Kenya and identified some key contentious issues which the Task Force needed to grapple with and resolve.
- g) *Viva voce (oral) hearings of some of the member institutions of the Task Force, on some of the critical areas that required consideration by the Task Force:* During its retreat held at the North Coast Beach Hotel, Mombasa, 26-27 June, 2015, the Task Force gave an opportunity to some of the concerned Member institutions to air their views regarding some of the preliminary recommendations of the Task Force.
- h) *Consideration of memorandums from members of the public and various stakeholders:* All the memorandums submitted to the Task Force were considered by the Chairperson of the Task Force and circulated to the Task Force members by the Joint Secretaries, for comments.
- i) *Data Analysis of memorandums received by the Task Force and other relevant material:* The Secretariat undertook data analysis of the submissions received by the Task Force. The Technical Committee of the Task Force held a retreat at the North Coast Beach Hotel, Mombasa, 22-25 June, 2015 to critically analyse various proposals and identify contentious issues for consideration by the High Level Segment of the Task Force (retreat) held at the same venue from 26th to 27th June, 2015.
- j) *Development of an Interim Report of the Task Force giving highlights of some of the proposals requiring urgent attention and implementation, especially with regard to the composition and organizational structure of EACC:* An Interim Report was prepared by the Secretariat and approved by the Task Force on 29th May, 2015.
- k) *Development of the fair draft Report documenting the work of the Task Force and setting out its recommendations:* Following further recommendations arising from the High Level Segment retreat of the Task Force of 26-27 June, 2015, the Secretariat organized a short technical retreat, which was held at Lukenya Getaway, Athi River, 6-10 July, 2015, during which retreat a fair draft of the Report was developed. Subsequently, on 27th July, 2015, the Report was subsequently shared with the Members of the Task Force and the Technical Committee for their comments. The comments the Secretariat received were processed and incorporated into the Report. After further internal editing, the Report was eventually submitted to the 6th Meeting of the Task Force, held at the AG's Chambers on 2nd September, 2015, for consideration and approval.
- l) *Validation of the Report of the Task Force:* The Task Force Report was eventually validated during stakeholders' workshop held at the Kenya Leadership and Integrity Forum (KLIF) secretariat offices, Nairobi Business Park, Nairobi, on 8th September, 2015. The workshop participants were drawn from member institutions of KLIF,

which is composed of fourteen sectors involved in the fight against corruption.⁶ The Forum was previously chaired by the Secretary/Chief Executive of EACC, and is currently chaired by the Attorney-General.

- m) *Editing of the Report of the Task Force:* After the validation of the Report, a small technical team composed of the Secretariat and select members of the Technical Committee edited the fair draft of the Report, during a retreat held at the Machakos University College, Machakos, from 9th to 11th September, 2015.

1.5 Key Policy Issues

An induction workshop for the Task Force members and Secretariat was held at the Kenya School of Law, Nairobi on 27th April, 2015. The key objective of the workshop was to interpret the Terms of Reference. Key policy issues identified during the Workshop were:-

- (a) Enhancing capacity of EACC as the lead anti-corruption agency by examining and reviewing its structure, powers and functions;
- (b) Review of existing anti-corruption laws;
- (c) Strengthening collaboration among law enforcement agencies in the criminal justice system particularly in combating corruption and economic crimes;
- (d) Strengthening the capacity of the Judiciary in hearing and determining corruption cases;
- (e) Developing a framework for combating corruption in the devolved system of government;
- (f) Enhancing public participation in the fight against corruption; and
- (g) Mainstreaming corruption prevention.

Subsequently, the Task Force requested memorandums from member institutions and other stakeholders in the fight against corruption, focusing on the identified Thematic Areas and other relevant matters on the fight against corruption. The Secretariat was also tasked by the Task Force to undertake various background and comparative studies on the fight against corruption in Kenya and in other jurisdictions. Eventually, the Secretariat prepared an Interim Report and later a Draft Report of the Task Force, which were subsequently considered and approved by the Technical Committee and the Task Force. The work of the Task Force was also ably supported by four governance and anti-corruption consultants supported by GIZ. The consultants provided objective reviews to the drafts and in some cases offered proposals to some contentious issues.

1.6 Interpretation of the Terms of Reference

In interpreting its TORs, the Task Force took cognizance of the fact that corruption was rampant in the country, hence the need for concrete interventions. The Task Force received

⁶The Validation Workshop was attended by representatives of: Ethics and Anti-Corruption Commission (EACC); Office of the Attorney-General and Department of Justice (OAG&DOJ); Office of the Director of Public Prosecutions (ODPP); the Judiciary; Independent Electoral and Boundaries Commission (IEBC); Office of the Auditor General; Office of the Controller of Budget (COB); Office of the President (OOP); National Police Service (NPS); Ministry of Devolution and Planning (MODP); National Anti-Corruption Campaign Steering Committee (NACCSC); Public Procurement Oversight Authority (PPOA); Kenya Law Reform Commission (KLRC); Witness Protection Agency (WPA); Efficiency Monitoring Unit (EMU); National Council on Law Reporting (NCLR); Media Council of Kenya (MCK); Non-Governmental Organisations (NGO) Council; Transparency International (Kenya Chapter); Kenya Private Sector Alliance (KEPSA); Hindu Council of Kenya (HCK); Association of Professional Societies of East Africa (APSEA); Society for International Development (SID) and the Kenya Leadership and Integrity (KLIF) Secretariat.

invaluable guidance from H.E. the President's *State of the Nation Address*, when he stated that:

Corrupt practices have permeated all sectors of our society. Corruption networks have constrained the effective delivery of public services critical for the realisation of Vision 2030, undermined the hard work and sacrifice of Kenyans and marred the image of the country. This has manifested in, among others, procurement, recruitment and execution of government projects and programmes leading to loss of public trust in government.⁷

In the same breath, the Task Force was concerned about Kenya's pitiable ranking in various corruption perception indices. The Task Force noted that Kenya continues to be ranked among the most corrupt countries in the world. According to the Transparency International (TI) *Corruption Perceptions Index of 2014*, Kenya was ranked position 145 out of 175 countries and territories in a survey which assessed the perceived levels of public sector corruption. Similarly, in its *National Survey on Corruption and Ethics* conducted in 2012/2013, EACC has shown that the level of corruption is high and increasing. While this could be a case of mere perception as opposed to real corruption, the poor rankings should spur serious policy and legal interventions as well as institutional reforms.

Admittedly, Kenya has done fairly well in terms of enacting most of the standard anti-corruption laws and established a number of dedicated bodies to fight corruption and to promote good governance and ethics. The country has also undertaken diverse reforms in the public sector to ensure that suspected corrupt public officials are removed from office. Other interventions which have been put in place are:- judicial reforms resulting in the "radical surgery" of the Judiciary in 2003 and the vetting of judges and magistrates in line with the provisions of the new Constitution of Kenya, 2010; the introduction of competitive hiring of judges as well as independent funding of the Judiciary; establishment of Commission of Inquiry into the Goldenberg Affair, and the Ndung'u Commission on Illegal/Irregular Allocation of Public Land to inquire into various allegations of corruption and misappropriation of public property;⁸ prosecution of suspects over the Goldenberg and Anglo-Leasing scandals; recovery of corruptly-acquired assets, such as the Grand Regency Hotel and the Kenyatta International Convention Centre (K.I.C.C.); the launch and implementation of a national anti-corruption campaign (by NACCSC) since 2004; financial sector reforms undertaken by the Ministry of Finance/National Treasury to introduce regulatory licensing as opposed to revenue-generating licensing (since 2006); public sector reforms (such as performance contracting, wealth declarations by all public officers, adoption of Codes of Conduct and Ethics, etc); the adoption of National Values and Principles of Governance Sessional Paper, and the National Action Policy and Action Plan on Human Rights, among other initiatives. In the political scene, there has also been some significant reforms, such as the enactment of the Political Parties Act, 2011 (No.11 of 2011) to regulate the operations and funding of political parties.

However, the fight against corruption has been encumbered by a number of challenges, to wit: wavering political will to fight corruption; a culture of high tolerance for corruption; weak enforcement of laws by law enforcement institutions; lack of public awareness; non-regulation of campaign financing, and negative ethnicity. The adoption of the devolved system of government has created more opportunities for corruption due to new weak institutions and systems. In addition, the enhanced constitutional latitude has had an unintended bottleneck to

⁷Republic of Kenya, H.E. President Uhuru Kenyatta, CGH: *Annual Report on Measures Taken and Progress Achieved in the Realization of National Values and Principles of Governance*, Republic of Kenya: *The Kenya Gazette* (Special Issue), Gazette Notice No. 2117, 31st March, 2015).

⁸ Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, (Chairman: Paul Ndung'u), Nairobi, June, 2004).

the fight against corruption. For instance, executive powers are now more constrained under the Constitution. Secondly, the expanded Bill of Rights coupled with liberal *locus standi* and affordable public interest litigation regime has enabled litigants to use judicial interventions to block investigations against them or the conclusion of corruption and economic crime cases.

Despite the challenges faced in the fight against corruption, there are a number of opportunities which can be utilized to bolster the fight against corruption. First, the new Constitution provides an elaborate system of checks and balances and also establishes a value system (under Article 10 and Chapter Six of the Constitution) which seeks to establish a human rights respecting state and inculcate a culture of ethical service and servant leadership in the Public Service. Secondly, the Second Medium Term Plan (MTP) (2013-2017) (for the implementation of Kenya Vision 2030) recognises national values and ethics as one of the foundations for national transformation. Thirdly, the government has adequate support in Parliament which both the National Rainbow Coalition (NARC) (2003-2007) and the Grand Coalition (2008-2013) governments lacked. And finally, the implementation of Kenya's international anti-corruption obligations under UNCAC and AUCPCC and the proposed East African Community (EAC) Protocol on Preventing and Combating Corruption, is expected to ensure that Kenya's anti-corruption war compares favourably with the best anti-corruption strategies of the least corrupt countries.

The Task Force appreciated that the country's infrastructure for fighting corruption was weak and inadequate in terms of policy, laws and institutions. The Task Force was therefore, mandated to review the anti-corruption infrastructure with a view to enhancing it. In line with its TORs, the Task Force assessed and structured its assignment as follows:-

a) Review the laws, policies and institutions that facilitate the fight against corruption

There are many weaknesses and gaps in the laws and policies for fighting corruption, especially with regard to campaign financing laws, freedom of information, protection of whistle-blowers, and treatment of State officers, among others. The institutions established to fight corruption suffer many weaknesses in terms of funding, expertise, management and co-ordination/cooperation. To examine this issue, the Task Force was expected to undertake an objective, honest, humble, and diligent assessment of the situation. Further, the Task Force was expected to undertake an introspection of what ails the fight against corruption- from an institutional design, competences and capacities, relations and mandates, legal structures and enforcement perspective. As such, attempts at self-preservation had to be dealt with.

b) Propose necessary reforms to the laws, policies and institutions

The implementation of the assignment of the Task Force was bound to meet some resistance, granted that some member institutions of the Task Force were bound to be affected by the proposed. As such, some institutions were likely to be reluctant to support such reforms over the fear of losing some power, benefits or prestige. In order to ensure that the fight against corruption is effective, efficient and bears results for Kenyans, institutions were impressed upon to put up with such reforms and inconveniences. The danger of institutions protecting their turf was real. Thus, the Task Force was expected to address any issues of duplication, underfunding and collaboration, and propose appropriate legal, policy and institutional reforms without fear or favour.

c) Examine the organisational structures of the Ethics and Anti-Corruption Commission to ensure there is separation between the policy and operational roles

This task mainly sought to address the constant conflicts between the commissioners (Chairperson and Members) and the secretariat (Secretary/Chief Executive Officer/secretariat staff) of the national dedicated anti-corruption agency - EACC. The issue was somewhat thorny because most of the conflicts were about power struggles rather than lack of clarity on

roles or the intention to deliver on the mandate of the organisation. Some of the roles are also defined by the Constitution and hence the Task Force had to ensure that its proposals were consistent with the Constitution while, nevertheless, designing an organization that is fit for purpose, and that can deliver on its mandate. There was also need to review the operational leanings of the EACC, more particularly by evaluating its prevention, investigation and restitution mandates to determine its current and ideal priority focus within the current environment and hence determine its investment emphasis. The Task Force was also expected to examine the publicly-debated proposal to vest the EACC with prosecutorial powers and determine its suitability or otherwise.

d) Consider appropriate mechanisms for collaboration and co-operation

The Task Force was expected to examine the current mechanisms for collaboration and co-operation in the fight against corruption. It is noteworthy that some mechanisms already exist but have not been very effective. For instance, the Kenya Leadership and Integrity Forum (KLIF) and the National Council on Administration of Justice (NCAJ) are in place. KLIF is established through an informal agreement of various sectors and its Secretariat is provided by EACC. On its part, NCAJ is established under the Judicial Service Act, 2011. Thus, the Task Force was expected to review why some of those mechanisms and others have not been effective and recommend appropriate remedial measures.

e) Preventing and combating corruption in county governments/devolved funds

The Task Force was confronted with lots of concerns that corruption seems to have been devolved to the counties, thereby defeating the objects of devolution. The newly-created county institutions and systems are weak and vulnerable to corruption. A culture of wastage of public funds, patronage and abuse of office may be taking root. Reports from EACC, the Auditor-General, and the Controller of Budget evidence massive losses of funds allocated to county governments. Thus, the Task Force was expected to review the infrastructure for corruption prevention, detection and punishment and propose measures to enhance it at the devolved level of government.

f) Role of Non-State Actors (civil society, religious organizations, and private sector, among others) in the fight against corruption

A successful war against corruption cannot be waged without the involvement and support of all sectors of society. The National Anti-Corruption Plan (NACP) and the proposed Kenya Integrity Plan (KIP)⁹ has defined clear roles for NSAs in the fight against corruption. As such, the Task Force was expected to address some concerns raised by various NSAs over the state of affairs in the fight against corruption and the promotion of good governance in the country, so as to enlist their support in the fight against corruption. Consequently, there is need to address the usual apathy and cynicism by NSAs over the government's anti-corruption initiatives.

g) Training and capacity building institutional arrangements

For a successful onslaught on corruption, institutionalized, regular, specialised training and capacity-building for those responsible for the fight against corruption is necessary. This may be provided by existing institutions or new institutions. The Task Force was expected to consider whether the institutions were adequate and effective, and what reforms should be put in place for purposes of ensuring that the provision of the necessary training and capacity-building to anti-corruption bodies and other stakeholders, was informed by the principles of sustainability and economic utilization of resources.

⁹ The Kenya Integrity Plan (KIP) was eventually validated by stakeholders at a breakfast workshop held at the Serena Hotel, Nairobi. The function presided over by the Attorney-General (Prof. Githu Muigai, E.G.H., SC), on 27th August, 2015, and graced by the Chief of Staff and Head of Public Service (Mr. Joseph K. Kinyua, C.B.S.).

h) International and Regional Support

Much as corruption is an issue of major concern to Kenyans, there is no doubt that corruption and anti-corruption are issues of regional and international concern. As such, the Task Force was expected to examine some of the best practices in fighting corruption at the international, regional or various countries, which could be adopted and domesticated with modifications in Kenya. In particular, the Task Force was expected to pay attention to the recommendations arising from the review of Kenya's implementation of UNCAC and AUCPCC. At the same time, the Task Force would also be expected to consider technical assistance needs in the fight against corruption and identify opportunities for technical support.

CHAPTER TWO: BACKGROUND AND SITUATIONAL ANALYSIS

2.1 Introduction

The Task Force undertook an analysis of the Terms of Reference (TORs) during its second meeting held on 21st April, 2015 and subsequently during its Induction Workshop held on 27th April, 2015. It is also noteworthy that at its inaugural meeting held on 8th April, 2015, the Task Force resolved, *inter alia*, that the proposals which were to be considered or put forward by the Task Force would encompass any matter that would enhance the fight against corruption and promotion of ethics and integrity. This included proposals on amendments to the existing legal frameworks, institutional realignments and statutory reforms or amendments where appropriate.

2.2 Situational Analysis

Globally, corruption has been identified as one of the major obstacles to socio-economic development. The Government of Kenya has undertaken various initiatives aimed at addressing corruption and unethical conduct as part of its development agenda as encapsulated in Kenya Vision 2030 and various good governance programmes. These initiatives are geared towards reforming policy, legal, regulatory and institutional frameworks. Admittedly, these reforms have been on-going for a number of years.¹⁰

To be fair to Kenya, corruption and anti-corruption are now new phenomena in Kenya's history. There is abundant evidence of corruption in Kenya's colonial and post-colonial era. In his *Birth of a Nation: The Story of a Newspaper in Kenya*, Gerard Loughran observes that as far back as 1907, corruption was already beginning to take root in the country. He cites Lord Delamare as having said that, 'Time after time I have heard a native say they have been stopped by an Indian policeman and when I asked them how they got away, they always said, "Oh, I gave him something"'.¹¹ Loughran notes that due to the inequalities which existed in the colonial era, corruption was bound to take root.

However, the fact that Europeans were also engaging in corruption evinces the fact that corruption was not, and is still not, an African affair. David Anderson in his book, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of an Empire: Testimonies from the Mau Mau Rebellion in Kenya*,¹² which is about the British campaign against the Mau Mau Movement in the 1950s, records the exposure (by colonial officials from London) of a construction scam in 1953, when some of the estates in Eastlands, Nairobi were being put up. Anderson observes that the revelation of the scam prompted the then engineer of the Nairobi City Council, Mr. Harold Whipp, to commit suicide on a railway track. These events prompted the colonial government to facilitate the enactment of the Prevention of Corruption Ordinance of 1956, which later became the Prevention of Corruption Act (Cap. 65) at independence. This Act was eventually replaced with the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

Regarding the post-independence era, Loughran observes that for some time discussion about official corruption and misuse of public funds were taboo subjects.¹³ He associates much of the corruption which took place in the post-independence era to the recommendations of the

¹⁰ For a detailed analysis of Kenya's anti-corruption initiatives in the early 2000s, see generally: Ludeki, Chweya, "The Government Anti-Corruption Programmes, 2001-2004", in L. Chweya *et al*, *Control of Corruption in Kenya: Legal-Political Dimensions 2001-2004*, (Nairobi: Claripress Ltd., 2005), pp. 1-51.

¹¹ Gerard Loughran, *Birth of a Nation: The Story of a Newspaper in Kenya* (London: I.B. Taurus, 2010) at p. 86.

¹² David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of an Empire: Testimonies from the Mau Mau Rebellion in Kenya*, (London: W&N, 2006).

¹³ Loughran, *supra*, f.n. 11, at p. 85.

Ndegwa Commission on Public Service Structure and Remuneration, 1971,¹⁴ which recommended inter alia, that to maintain civil servants' living standards and motivation at a time when many bright Kenyans were going into better-paid private sector, they should be permitted to engage in business, provided their business was not similar to their work responsibilities.¹⁵ Apparently, if the conflicts-of-interest provisions in the various anti-corruption laws are enforced, and proper checks and balances are put in place, to ensure that Public officers comply with the law, the implementation of the Ndegwa Commission Report would not necessarily lead to corruption.¹⁶ Some of the legal instruments which deal with conflicts of interest issues are: The Public Officer Ethics Act, 2003; the Leadership and Integrity Act, 2012 and the Public Procurement and Disposal Act, 2005. The issue of conflicts of interest is also addressed in Section G (Rules of Conduct) of the Code of Regulations, which applies to all civil servants.¹⁷

Going by the findings of various corruption perception surveys, Kenya continues to be ranked among the most corrupt countries in the world. According to the Transparency International (TI) *Corruption Perceptions Index of 2014 (CPI)*, which measured the perceived levels of public sector corruption in 175 countries and territories, Kenya was ranked position 145.¹⁸ The top three least corrupt countries were Denmark (1), New Zealand (2), and Finland (3). Botswana was ranked position 31 – as the least corrupt country in Africa. The ranking is based on a composite score calculated on various parameters, the most significant of which is implementation or non-implementation of reports of supreme audit institutions or law enforcement bodies. While the CPI is not based on actual experience of corruption, low rankings should necessitate some institutional, legal and policy interventions geared towards establishing and sustaining a multi-sectoral approach to the fight against corruption while also ensuring that there is transparency and accountability in the management of public affairs, especially through access to information.

In addition, according to the EACC *National Survey on Corruption and Ethics* conducted in 2012/2013, the level of corruption in the country was found to be high. The survey involved a household survey of 4,190 households, interviews with 1,206 enterprises and 1,348 public officers. In total, 6,744 respondents were interviewed. The Survey showed that the level of corruption was high according to 67.7 per cent of the respondents as opposed to 8.3 per cent of the respondents who rated it as low. 48.3 per cent of the respondents indicated that the level of corruption in the country was increasing as compared to 32.4 per cent who thought that the level of corruption was decreasing. The survey further showed that 17 per cent of the respondents were asked for a bribe by the service provider (public officers).

Of those a bribe was demanded, 68.4 per cent paid the bribe. The average bribe was KSh. 4,601.05. Bribery was cited by 77 per cent of respondents as the most prevalent form of corruption witnessed in Government offices. In terms of the causes of corruption, greed was the leading cause of corruption in Kenya as cited by 35.2 per cent of the respondents surveyed. Half of the respondents indicated that the Government was committed to fighting corruption and promoting sound ethical behaviour in the Public Service as opposed to 45.2 per cent who stated that the government was not committed. The EACC survey concluded by recommending, *inter alia*, effective anti-corruption measures, including policy reforms and

¹⁴See generally: Republic of Kenya: *Report of the Commission of Inquiry (Public Service and Remuneration Commission) 1970-71* (Chairman: D. N. Ndegwa) (Nairobi: Government Printer, 1971).

¹⁵Loughran, *supra*, at p. 88.

¹⁶For a critique of the Ndegwa Report, see: Kivutha Kibwana, Smokin Wanjala and Okech-Owiti, *The Anatomy of Corruption in Kenya: Legal, Political and Socio-Economic Perspectives*, (Nairobi: Claripress Ltd., 1996), at p. 109.

¹⁷Republic of Kenya, *Code of Regulations*, (Directorate of Personnel Management, Nairobi 2006) at p.4.

¹⁸<https://www.transparency.org/cpi2014>

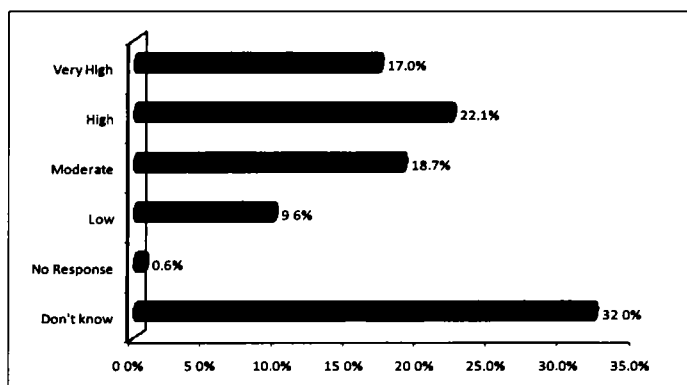
review of systems, procedures and practices for purposes of addressing corruption in the country decisively.

Recent reviews of Kenya’s implementation of various anti-corruption instruments show the need for a high-level policy impetus to the fight against corruption and the promotion of ethics and integrity in the country. For instance, the Draft Country Report on the Review of Kenya’s Implementation of the *United Nations Convention against Corruption (2015)* shows that Kenya has made significant progress in terms of implementing its UNCAC obligations through the enactment of various anti-corruption laws and establishment of various anti-corruption bodies but notes that the enforcement and outcome of these anti-corruption initiatives requires enhancement. A similar Progress Report filed by Kenya under the auspices of the African Convention on Preventing and Combating Corruption in May, 2012 shows the same trend.

Corruption in public institutions in Kenya has been reported in many studies which have indicated high levels of corruption in the country. In 2014, EACC conducted the *Corruption and Ethics Survey, 2014* between April and June 2014 to generate baseline data on key anti-corruption indicators at the national and county levels and map out corruption prone areas.

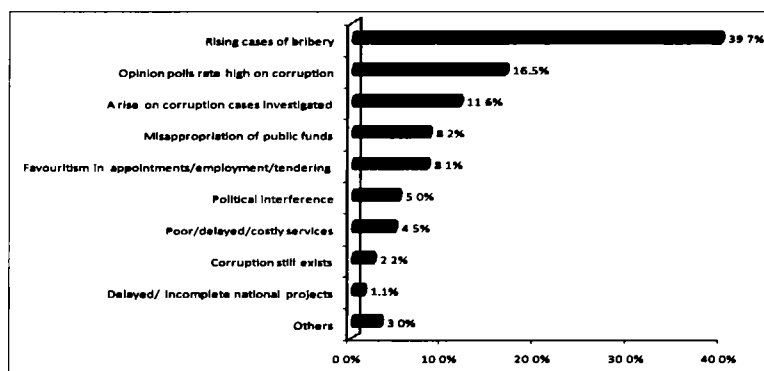
According to an interim report of the EACC survey, corruption remains a major challenge in the counties. The levels of corruption are perceived to be high. At the national level, 17 per cent of the respondents indicated that corruption was very high, 22.1 per cent high and 9.6 per cent low. However, 32 per cent of the respondents could not rate the level of corruption in the national government; as shown in Figure 1.

Figure 1: Perceived Level of Corruption in the National Government



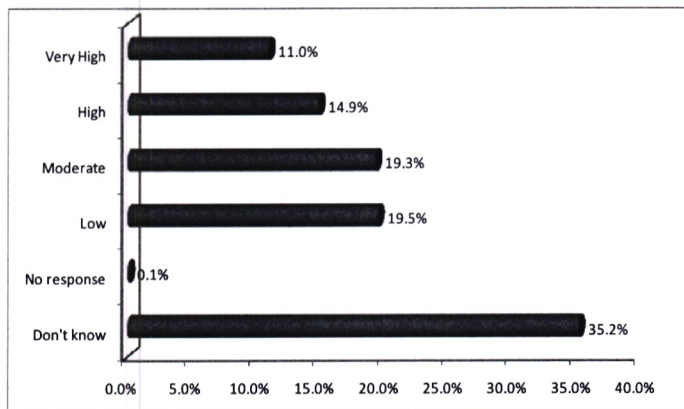
The main reasons why corruption is perceived to be high include the rising cases of bribery, ratings in the opinion polls to increase in the number of corruption cases investigated; as depicted in Figure 2.

Figure 2: Reasons for High Level of Corruption at the National Government



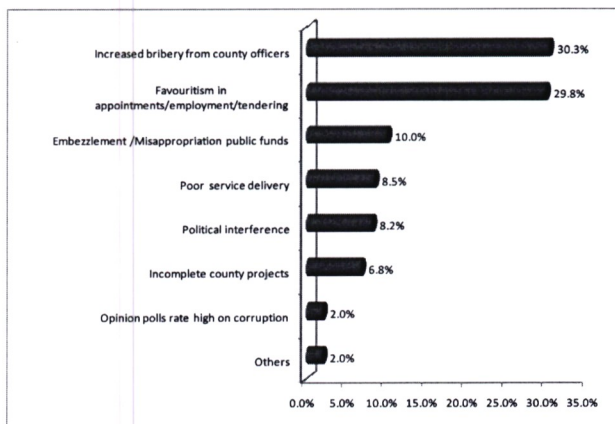
On the perceived levels of corruption in the county government, 11 per cent of the respondents indicated that it was very high, 14.9 per cent high and 19.5 per cent low. On the contrary 35.2 per cent could not rate the level of corruption in the county government; as depicted in Figure 3.

Figure 3: Perceived Level of Corruption in the County Governments



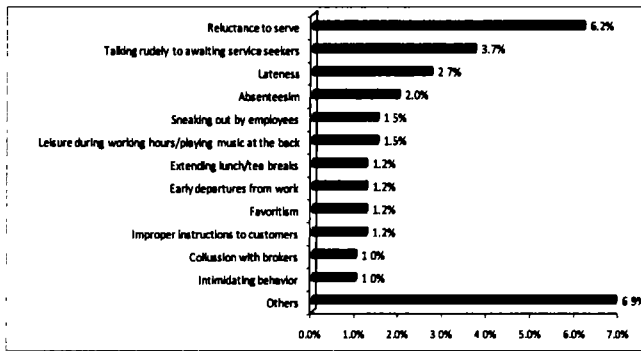
Respondents in the Survey cited various reasons for high level of corruption in the county governments. The most preponderant reason was increased bribery form county officers as expressed by 30.3 per cent of the respondents. This was followed by favouritism in county appointments or awarding of tenders as reported by 29.8 per cent of the respondents. Other reasons are as presented in Figure 4.

Figure 4: Reasons for High Level of Corruption at the County Governments



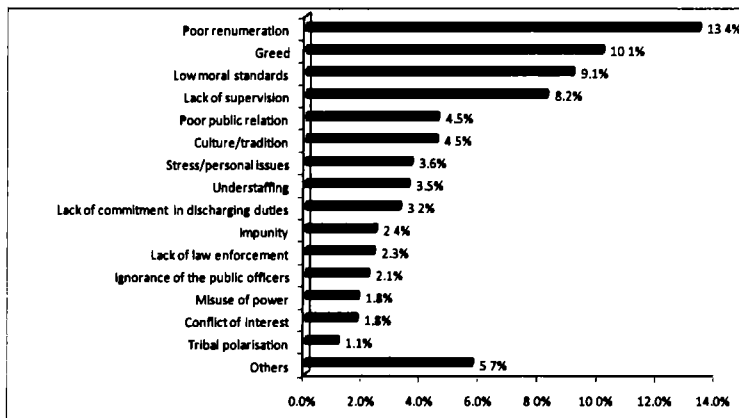
In terms of the forms of unethical conduct prevalent in the public service, laxity, rudeness, lateness and absenteeism were found to be the major forms of unethical behaviour observed in the Public Service as reported by 6.2 per cent, 3.7 per cent, 2.7 per cent and 2 per cent of the respondents respectively. This is as presented in Figure 5.

Figure 5: Forms of Unethical Conduct Observed



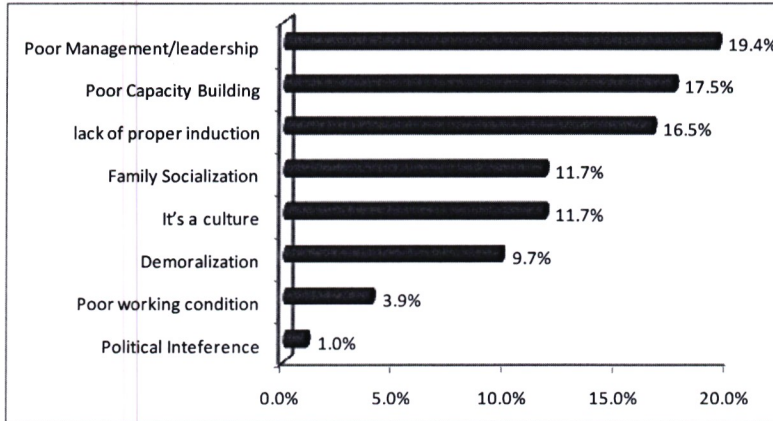
Poor remuneration, greed and low moral standards are the three major reasons cited for unethical behaviour in the public service. This was reported by 13.4 per cent, 10.1 per cent and 9.1 per cent of the respondents respectively. Figure 6 presents varied reasons in order of the *most* to the *least* mentioned reason.

Figure 6: Reasons Behind Unethical Conduct in the Public Service



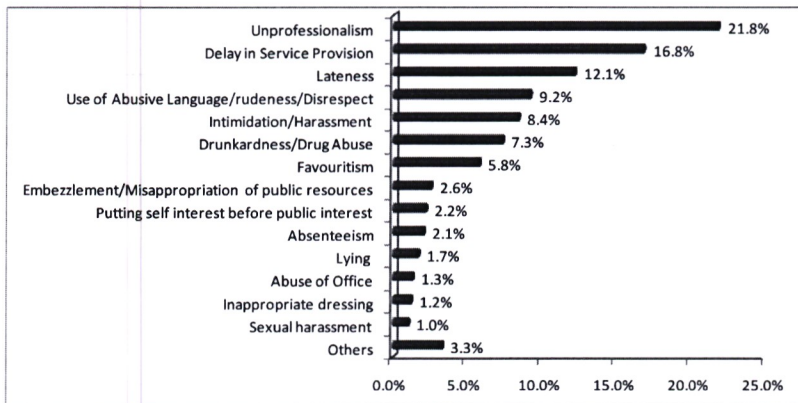
Poor management, poor capacity building and lack of proper induction were cited in the Survey as the three major reasons why public officials do not comply with the stated organizational values and principles. This is as reported by 19.4 per cent, 17.5 per cent and 16.5 per cent of the respondents respectively. Other reasons are as presented in Figure 7.

Figure 7: Reasons for Non-compliance with Codes of Conduct



The three most common forms of misconduct reported were; unprofessionalism, delay in service provision and lateness at work place. This was reported by 22 per cent, 17 per cent and 12 per cent of the respondents respectively. Other forms of misconduct experienced in the public offices included use of abusive language, harassment, drunkenness and favouritism, among others. Figure 8 presents various forms of misconduct witnessed in public offices.

Figure 8: Common Types of Misconduct in Public Offices



Some participants stressed the interconnected linkage between corruption and sexual harassment. This was particularly highlighted by women although some men also alluded to these experiences. Some forms of unethical conduct mentioned include sexual harassment, intimidation, discrimination, irregularities in the Judiciary as well as lobbying.

The upshot of the EACC *Corruption and Ethics Survey* (2014) on the nature, extent and various types of corruption in Kenya evinces the need for adoption of various legal, policy and institutional measures to curb corruption. Thus, unless remedial action is taken urgently, the capacity of the national and county governments to deliver services to the people will be severely compromised.

CHAPTER THREE: LEGAL, POLICY AND INSTITUTIONAL ARRANGEMENTS FOR FIGHTING CORRUPTION

3.1 Introduction

This Chapter responds to Paragraphs 3(a),(b),(c),(d), and (i) of the Terms of Reference (TORs), as set out in Gazette Notice No. 2118 of 30th March, 2015. Accordingly, The Task Force was required to, *inter alia*—

- (a) *Review the legal, policy and institutional framework for fighting corruption in Kenya;*
- (b) *Propose appropriate reforms to the legal, policy and institutional framework for fighting corruption and promoting ethics and integrity;*
- (c) *Propose appropriate amendments to various legal instruments with a view to strengthening the legal and institutional framework for fighting corruption;*
- (d) *Examine the organisational structures of the key anti-corruption agencies with a view to providing clear separation between the policy and operational roles of such entities; and,*
- (i) *Identify international or regional best practices in the fight against corruption.*

In the consideration of the aforementioned TORs, the Task Force made reference to the Constitution of Kenya, 2010, the relevant anti-corruption laws, and considered the mandates, powers and functions of various anti-corruption bodies and the challenges faced by such bodies in the execution of their mandates. It also considered the findings of previous reports and reviews on Kenya's anti-corruption regime, especially through the review of Kenya's implementation of the UNCAC. Additionally, the Task Force considered best practices drawn from other jurisdictions which were thought to be *pari materia* to the situation in Kenya. Eventually, the Task Force come up with appropriate recommendations on the necessary interventions aimed at achieving synergy and economy in the fight against corruption.

No doubt, Kenya has put in place various institutions for fighting corruption. The national dedicated anti-corruption body is EACC. Nonetheless, Kenya has adopted a multi-agency and multi-sectorial approach to fighting corruption. On its part, EACC fights corruption through four main strategies: enforcement (investigations), prevention, public education, and asset recovery. Besides EACC, there are other bodies which play a critical role in the fight against corruption, these institutions are: ODPP, which prosecutes corruption and economic crime cases investigated by EACC, and Special Magistrates (Judiciary) who preside over Anti-Corruption Courts and adjudicate over corruption and economic crime cases. We also have OAG&DOJ, which provides the necessary policy guidance over the development of appropriate anti-corruption policies and laws, and co-ordination of anti-corruption strategies in the Government.

Needless to say, by virtue of his position and in line with a number of constitutional and legal obligations, the President of the Republic of Kenya is expected to play, and does play, a critical role in the fight against corruption, especially through setting the nation's anti-corruption agenda and setting standards of good governance and integrity. The Task Force is, therefore, of the view that the support of the Presidency is essential to a successful onslaught on corruption in Kenya.

At the same time, there are also other bodies which play a critical but complementary role in the fight against corruption, these are:- the Office of the Auditor-General; the Office of the Controller of Budget; the National Treasury; the Independent Electoral and Boundaries Commission; Parliament; the Commission on Administrative Justice; the National Anti-Corruption Campaign Steering Committee; the National Police Service; the National

Intelligence Service; the Criminal Investigations Department; the Mutual Legal Assistance Central Authority; the Assets Recovery Agency; the Financial Reporting Centre; the Witness Protection Agency; the Inspectorate of State Corporations, and the Efficiency Monitoring Unit (EMU).

The following is a general overview of the key anti-corruption bodies in terms of the specific roles and functions each institution plays in the fight against corruption, their structure, their key achievements and challenges, and some observations and recommendations of the Task Force aimed at enhancing the capacity of these institutions in the fight against corruption.

3.2 The Presidency

3.2.1 The Role of the President in the Fight against Corruption

The President of the Republic of Kenya is expected under the Constitution, and in word and deed, to play a very critical role in the fight against corruption by providing the necessary political will for fighting corruption and setting the country's agenda for good governance and anti-corruption. The President is, among other things, the Head of State and Government, Commander-in-Chief of the Kenya Defence Forces and is a symbol of national unity.¹⁹ Under Article 131(2) (a) of the Constitution, the President is required "to respect, uphold and safeguard this Constitution", whose centrepiece is national values and principles of governance (Article 10) and Leadership and Integrity (Chapter Six).

Additionally, the President is required, under Article 132(1) (c) (i) and (ii) of the Constitution, to report to the nation once every year on the measures taken and progress achieved in the realisation of the national values referred to in Article 10 of the Constitution.²⁰ It is noteworthy that the national values and principles of governance set out in Article 10(2) (c) cover, *inter alia*, good governance, integrity, transparency, and accountability. To secure the implementation of the President's Annual Report, ministries, departments and agencies (MDAs) are required to contract, through the annual Performance Contract (PC) system, to implement various measures outlined in the President's Annual Report. The PC system has in-built rewards and sanctions mechanism, overseen by the Performance Contracting Office of the Presidency.

The other mechanism that the President may use to ensure good governance and anti-corruption principles are applied across the Public Service is through the use of annual or other regular or *ad hoc* reports submitted to him and Parliament by various constitutional commissions and independent offices. Article 254(1) of the Constitution requires every constitutional commission and Independent Office to submit a report to the President and to Parliament. The President or the Senate or the National Assembly may require a commission or holder of an independent office to submit a report on a particular issue.

Under the EACC Act and the ODPP Act, both EACC and ODPP have similar obligations to report to the President and Parliament. It is expected that the President will act on the recommendations made in such reports by a constitutional commission or an independent office, and more particularly by EACC, and ODPP. This reporting obligation is very useful to the President in terms of assessing the integrity of persons being considered for appointment or continued service or nomination for approval to serve as State officers or public officers in his Government.

¹⁹Article 131(1) of the Constitution of Kenya, 2010.

²⁰ See generally: H.E. Uhuru Kenyatta, C.G.H., *Annual Report on Measures Taken and Progress Achieved in the Realisation of National Values and Principles of Governance*, Republic of Kenya: *The Kenya Gazette* (Special Issue), Gazette Notice No. 2117, 31st March, 2015).

3.2.2 Recommendations of the Task Force

In order to create a culture of zero tolerance to corruption in the country, the Task Force recommends that the Presidency undertakes the following measures, among others:

- a) Provide the requisite political will and leadership in the fight against corruption and the promotion of ethics and integrity in the country.
- b) Mainstream the fight against corruption and economic crime by requiring the political leadership to speak about the ills of corruption and the need to combat the vice on National days at public event, just as has been the case in the campaign against HIV/AIDS.
- c) Ensure the implementation of the recommendations in the Annual Presidential Report on measures taken and progress achieved in the realisation of national values and principles of governance, pursuant to the provisions of Article 132(1)(c)(i) and (ii) of the Constitution.
- d) Create a culture of zero tolerance to corruption in the entire Government, including the Cabinet. Kenya could borrow a leaf from the “clean government policy” of the first Prime Minister of Singapore, Mr. Lee Kuan Yew, whose zero tolerance policy to corruption, coupled with the values of hard work, integrity, frugality, efficiency, and a saving culture, helped transform Singapore from a third world economy to a first world country within a span of three decades.²¹

Specific recommendations include:

- a) Non-appointment of persons to boards, Ambassadorial, Cabinet or Principal Secretary positions who are under investigation and/or prosecution for corruption-related offences and whose integrity is deemed compromised.
- b) Removal from office for persons appointed as Cabinet Secretary or Principal Secretary positions, board members, ambassadorial and other state offices who are under investigation and/or prosecution for corruption related offences and whose integrity is deemed compromised.
- c) Repeated and re-emphasized public statements and support for anti-corruption efforts in all required reports to Parliament, public holiday addresses.
- d) Public endorsement and participation in activities of relevant agencies responsible for and/or undertaking anti-corruption and integrity activities.
- e) In exercise of his function to confer honours in the name of the people and the Republic under Article 132(4)(c) of the Constitution, the President should ensure that persons being conferred with national honours meet the integrity requirements prescribed under Chapter Six of the Constitution (Leadership and Integrity), and the Leadership and Integrity Act, 2012 (LIA), among other laws.
- f) The President should also proceed to “strip” and revoke an award of honour to any recipient who is convicted of corruption or an economic crime or is in breach of Chapter Six of the Constitution, LIA or the Public Officer Ethics Act, 2003 (POEA) or a person who has been dismissed from a State office or public office for want of integrity. Section 10(c) of the National Honours Act, 2013,²² provides that the President may revoke a national honour where “a person acts in a

²¹ See generally: Lee Kuan Yew, *From Third World to First: The Singapore Story: 1965-2000*, (New York: Harper Collins Publishers Inc., 2000).

²²The National Honours Act, 2013 (No. 11 of 2013).

manner inconsistent with the honour". In the same vein, Paragraph I(e) of the *Guide to Awards of Orders, Decorations and Medals*,²³ provides the grounds for forfeiture policy on titles of honour, thus:

Titles of honour shall be forfeited by persons convicted of treason, sedition, murder, rape, corruption, terrorism and drug trafficking. Any such person shall be stripped of the title. This shall also apply to those who are dishonourably discharged from the Armed Forces.

- g) Mobilize Governors, through the Council of Governors, inter-governmental relations structures, to uphold and practise a culture of zero tolerance to corruption in their counties.**
- h) Publicly support the implementation of the recommendations of investigative, law enforcement and oversight authorities such as EACC, ODPP, DCI, Auditor General, Controller of Budget, the National Treasury, Parliament, and OAG&DOJ, regarding corruption and integrity issues touching on a public entity, State officer or a Public officer.**
- i) Through OAG&DOJ, act on the recommendations in reports of constitutional commissions and independent offices issued pursuant to the provisions of Article 254 of the Constitution, and especially those relating to integrity issues.**
- j) Subject to the prevailing laws, use the Efficiency Monitoring Unit (EMU) in the Presidency, to inquire into allegations of inefficiency or misappropriation of public funds, and take necessary administrative action based on the outcome of such inquiries, without prejudice to the possibility of criminal action following investigations by independent agencies such as EACC. For instance, according to reports of the Auditor General, cases of unsurrendered imprests amounting to millions are legion, which bodies like EMU could pursue on behalf of the Government or affected public entities.**
- k) Publicly support the implementation of Court orders issued by the Judiciary on leadership and integrity issues, and corruption and economic crime matters.**
- l) Facilitate the criminalisation of false claims against the Government.**
- m) In liaison with Parliament, address public concerns about Parliamentary immunity and impunity from corruption charges.**
- n) Publicly support the ban of foreign companies found guilty of corruption and economic crime from operating in Kenya.**
- o) Ensure that public officers who discharge their duties diligently and stand up against corruption are protected against any forms of reprisals, victimisation or discrimination, as envisaged under Article 236 of the Constitution.**
- p) Secure the protection and motivation of public officers who report acts of corruption against reprisals or intimidation or dismissal from employment and facilitate public commendation and recognition for public officers who are champions of integrity.**
- q) Enhance initiatives that provide an enabling environment for the media, civil society organisations and ordinary citizens to report cases of corruption and ensure that such reports are acted upon and feedback given within a reasonable time by the recipients of such reports.**

²³ Republic of Kenya, *Guide to Awards of Orders, Decorations and Medals* (Office of the President (Cabinet Office), Nairobi, 2004), at p. 2.

- r) **The state should create an atmosphere for people to enjoy a basic standard of living, and thereby avoid recourse to petty corruption or unethical practices or rent-seeking behaviour. Thus, the state should facilitate the provision of welfare support to indigent Kenyans within the framework of the Constitution of Kenya or national policies, especially: minorities and marginalized groups (Article 56); the Older Members of Society (OMS) (Article 57), Persons With Disabilities (PWDs) (Article 54), People Living With AIDS (PLWAs), Orphans and Vulnerable Children (OVC) (Article 53), and support for people suffering from chronic diseases, such as cancer.**
- s) **A sound family background is important to a state's overall strategy for promoting a national ethical value system. Therefore, the Government should facilitate the development of laws and Government policies that promote family values (as per Article 45 of the Constitution) and which enable indigent families access at least some basic economic and social rights (as per Article 43 of the Constitution), and further provide protection to the family against adversities that put the future of the family at great peril.**
- t) **In line with the provisions of Article 132(5) of the Constitution of Kenya, ensure that the international obligations of the Republic, arising out of the international anti-corruption instruments that Kenya is a State Party to, such as the United Nations Convention against Corruption (UNCAC), and the African Union Convention on Preventing and Combating Corruption (AUCPCC), are fulfilled through the actions of relevant Cabinet Secretaries.**

3.3 The Ethics and Anti-Corruption Commission (EACC)

3.3.1 Legal and Constitutional Status of EACC

The Ethics and Anti-Corruption Commission (EACC) is the national dedicated and premier anti-corruption agency.²⁴ It is a constitutional commission established in accordance with the provisions of Article 79 of the Constitution and Chapter Fifteen of the Constitution. More specifically, the composition of the Commission is set out under Section 3 of the Ethics and Anti-Corruption Commission Act, 2011. The Act was enacted pursuant to the provisions of Article 79 of the Constitution, which requires that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission for purposes of ensuring compliance with, and enforcement of the provisions of Chapter Six of the Constitution on Leadership and Integrity.

Apart from Chapter Six of the Constitution, EACC derives its mandate from other laws, such as: the Ethics and Anti-Corruption Commission Act (No. 22 of 2011); the Leadership and Integrity Act, 2012 (No. 19 of 2012); the Anti-Corruption and Economic Crimes Act, 2003, and the Public Officer Ethics Act, 2003.

3.3.2 Powers and Functions of EACC

In a nutshell, the powers and functions of EACC are—

- (a) developing and promoting standards and best practices in integrity and anti-corruption and developing a code of ethics for State Officers;
- (b) working with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;

²⁴ For more information on the establishment, mandate, powers, functions and activities of EACC, visit: www.eacc.go.ke. See: EACC, *Strategic Plan 2008-2018* (Nairobi: EACC, March, 2014). See also the EACC report under Section 27 of the EACC Act: EACC, *Annual Report 2013-2014* (Nairobi: EACC, 2014).

- (c) receiving complaints on the breach of the code of ethics by public officers;
- (d) investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under relevant Acts or any other law enacted pursuant to Chapter Six of the Constitution;
- (e) recommending appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- (f) overseeing the enforcement of codes of ethics prescribed for public officers;
- (g) advising any person on any matter within its functions;
- (h) raising public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 as to confidentiality;
- (i) monitoring the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- (j) instituting and conducting proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

3.3.3 Structure of EACC

In line with the provisions of Article 79 and Chapter Fifteen of the Constitution, EACC has the design and structure of a constitutional commission. Consequently, it is composed of a Chairperson and two other Members in line with Article 250 (1) of the Constitution and Section 4 of the EACC Act. Under the current provisions of the EACC Act, the members of EACC serve on full-time basis. However, there is a move to amend the law to provide for part-time members.²⁵

According to Section 6 of the EACC Act, the Chairperson and Members are recommended for appointment after selection by a Selection Panel composed of representatives from diverse interests and institutions, after which they are evaluated and nominated by the President for vetting by the National Assembly. Once the National Assembly vetted and approved a candidate, he or she is then appointed by the President.²⁶

In accordance with Section 16 of the EACC Act, the Secretary/Chief Executive Officer of EACC is recruited and appointed by the Commission with the approval of Parliament (National Assembly). The Secretariat, which is headed by the Secretary/Chief Executive of the Commission, is composed of staff recruited by EACC and /or vetted staff inherited from its

²⁵ While the at the beginning of the work of the Task Force, the question of the number of EACC members and their tenure of service (full-time or part-time) was under consideration, the issue was subsequently addressed by Parliament through the enactment of the Ethics and Anti-Corruption Commission (Amendment) Act, 2015 (No. 12), which provides that the Commission shall be composed of a Chairperson and four members who will be serving on part-time basis.

²⁶It is noteworthy that the recruitment procedure of EACC members has now changed following the enactment of the Ethics and Anti-Corruption Commission (Amendment) Act, 2015, which vests the responsibility to recruit the Chairperson and Members of the Commission on the Public Service Commission (PSC), as opposed to a Selection Panel, after which names of qualified candidates are forwarded to the President for consideration, and eventual transmission of his preferred candidates for approval by Parliament, after which the President would appoint the approved candidates.

predecessor institution (the Kenya Anti-Corruption Commission (KACC)); or staff seconded from the Public Service Commission at the request of EACC. Apart from its headquarters, EACC has nine regional offices and two satellite offices.

Pursuant to a job evaluation undertaken in 2013, EACC has an approved staff establishment of 2,246 (two thousand two hundred and forty six). In reality, however, as at 30th June 2015, it has approximately 440 (four hundred and forty) members of staff in post. Out of these, about three quarters are under the operational directorates of EACC, namely: investigations, asset recovery, prevention and education. The rest are in the two support Directorates: Finance and Planning, and Human Resource and Administration.

3.3.4 Observations of the Task Force.

The Task Force made the following observations:

- a) Currently, EACC is composed of a Chairperson and four other Members, appointed as per Section 4 of the EACC Act. Each commissioner (member) should also be charged with the oversight over a certain Directorate in the Commission, to ensure that their contribution to the work of the Commission is focused. The Task Force noted that until the amendments effected to the EACC Act by the Ethics and Anti-Corruption Commission (Amendment) Act, 2015, EACC had a full-time chairperson and two members serving on full-time basis and that it also had a full-time Secretary/Chief Executive. This hampered the smooth and proper functioning of the Commission as a law enforcement agency, and consequently compromised EACC's efficiency, effectiveness and output.
- b) The Commission receives technical support from the Secretariat headed by the Secretary/Chief Executive Officers to the Commission.
- c) The Secretary/Chief Executive Officer undertakes the full operational mandate of the Commission and yet he lacks the requisite security of tenure to cushion him from threats of removal from office for carrying out his duties.
- d) On resource allocation, a big proportion of the annual budgetary allocation to EACC goes towards meeting salaries and rent expenses. Very little is left for operational expenses, meaning that EACC is unable to roll out effective anti-corruption strategies with long-term goals supported by effective, in-depth and timely investigations using modern technology, and proper devolution of its services so that they cover the entire republic.
- e) On staff capacity, the staff complement of EACC, as at 30th June 2015, stood at 440 against an approved staff structure of 2,246. This has severely hampered the operations of the EACC resulting in a huge backlog of cases.

3.3.5 Recommendations of the Task Force.

In order to strengthen the role of EACC in fighting corruption, the Task Force recommends that:

- (a) The Commission should be composed of five (5) members (Commissioners) (including the Chairperson) up from the current three (3) who will all serve on part-time basis.²⁷**
- (b) The Members of the Commission should be re-designated as "Commissioners". As such, the word "Member" in the Ethics and Anti-Corruption Commission Act,**

²⁷This recommendation, which was made by the Task Force for priority consideration by Parliament, has since been implemented through the Ethics and Anti-Corruption Commission (Amendment) Act, 2015 (No. 12 of 2015), which was assented to on 1st September, 2015 and commenced operation on 3rd September, 2015.

2011, should be replaced with “Commissioner” wherever it appears in the Act, to reflect that change.

- (c) The Secretary/Chief Executive Officer of the Commission should be re-designated as “Director-General”.²⁸ Thus, the words “Secretary/Chief Executive Officer” in the Ethics and Anti-Corruption Commission Act, 2011, should be replaced with “Director-General” wherever they appear in the Act, to reflect that change.
- (d) The Director-General shall be the Chief Executive and Secretary of the Commission and shall be appointed by the Commission and vetted by Parliament as required by the Constitution and the EACC Act.
- (e) The Director-General shall manage the day to day affairs of the Commission while the Chairperson and the Commissioners will provide an advisory and policy-making role.
- (f) The Director-General shall be granted security of tenure to insulate him or her from threats that may hinder him or her discharging the functions of the office without fear or favour.
- (g) The Director-General of EACC shall be assisted by such number of Directors as may be necessary, appointed by the Commission. One of the Directors will be appointed Deputy Director-General. The Directors will be directly responsible to the Director-General.
- (h) The Commission shall give priority to law enforcement (Investigation, Asset Tracing and Asset Recovery) in the organization of its establishment and the discharge of its functions. Experience has shown that decisive law enforcement against corruption is the most effective way of fighting corruption. For instance, in Hong Kong SAR, before the formation of the Independent Commission against Corruption (ICAC) in 1974, corruption was a way of life.²⁹ Nowadays, Hong Kong is rated as one of the least corrupt countries in the world.

²⁸ During the Meeting of the Task Force held on 26th June, 2015, the Chairperson of the Commission on Administrative Justice(CAJ) (Dr. Otiende Amollo, EBS) registered his reservation to the proposed re-designation of the Secretary/Chief Executive of EACC to “Director-General”, arguing that it contradicted the provisions of Article 250(12) of the Constitution in particular, and Chapter Fifteen of the Constitution generally, in that EACC, though established pursuant to the provisions of Article 79 of the Constitution, had to assume the structure of a Chapter Fifteen Commission, which should have a Chairperson, members of the Commission, and a Secretary. However, he was overruled by the majority view, which was to the effect that bearing in mind that EACC is a law enforcement agency, it has to have a command-structure, centred around the Chief Executive, who would still be the Secretary to the Commission, and therefore, Article 250(12) of the Constitution would be complied with. Reference was also made to Article 252(1) (d) of the Constitution, which may be interpreted to give Parliament, through legislation, the power to grant other necessary powers and functions to a commission or each holder of an independent office. Thus, Article 252(1) (d) provides that a commission or each holder of an independent office, “may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred in this Constitution”. It was also noted that the Commission for the Implementation of the Constitution (CIC) had in a recent statement supported the idea of EACC having a command structure, like that of the National Police Service. See generally: Republic of Kenya, *Resolutions of the High Level Segment of the Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya*, held at The North Coast Beach Hotel, Mombasa, 26-27 June, 2015 (The Office of the Attorney-General and Department of Justice: Nairobi, 2015).

²⁹ Bertrand de Speville, in *Hong Kong: Policy Initiatives against Corruption*, (Paris: OECD, 1997), observes, at p. 11, that, “By the time the ICAC came to be formed in 1974 Hong Kong had a very serious corruption problem. Almost every aspect of life was affected. Corruption was deeply rooted, widespread, generally tolerated and, in some sectors, highly organised”. See also, Robert Klitgaard, *Controlling Corruption*, (Berkeley: University of California Press, Berkeley, USA, 1988), p. 100, who observes that before the anti-corruption laws were passed in Hong Kong, corruption in the Hong Kong Police force was a way of life.

- (i) **The Government should provide the necessary resources to achieve the optimal staffing level in EACC (2,246) as was established in the detailed Job Evaluation undertaken by the Directorate of Personnel Management (DPM). The Commission should, in the short term, continuously recruit staff towards achieving this objective.**
- (j) **As the premier anti-corruption agency, EACC must ensure zero tolerance to corruption within its staff and must not only put in place the necessary corruption preventive measures within its structures but must also conduct regular integrity testing on its staff with a view to ensuring that the staff are beyond reproach.³⁰**
- (k) **Wherever allegations of impropriety are raised against a member of staff, they must be investigated in an expeditious, objective and transparent manner.**
- (l) **The Government should provide adequate financial support to EACC to enable the Commission combat corruption effectively and timely at both the national and county levels of Government. In particular, the Commission should be facilitated to decentralise its services to all the 47 counties of the Republic.**
- (m) **EACC should develop guidelines on the investigation of corruption, economic crime cases and ethical breaches. In the same vein, the Commission should adopt a Code of Conduct for its investigators.³¹**
- (n) **The EACC Act should be amended to create a legal obligation for every person who witnesses or becomes aware of an act of corruption, to report the same to EACC within a reasonable time.**
- (o) **The EACC Act and other anti-corruption and economic crime related legislation should be amended to introduce new crimes as stated in other parts of this Task Force Report.**
- (p) **In order to embed EACC in the justice chain institutions, EACC should be considered for membership of NCAJ. As such, the Judicial Service Act, 2011 should be amended to provide for EACC membership of NCAJ.**

3.4. Office of the Director of Public Prosecutions (ODPP)

3.4.1 The Legal and Constitutional Framework of ODPP

The Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the Constitution of Kenya, 2010, and operationalized through the Office of the Director of Public Prosecution Act, 2013 which creates the structures and provides for a clear framework through which the prosecution mandate is executed.³²

3.4.2 Mandate

Pursuant to the provisions of Article 157 of the Constitution, 2010 and the Anti-Corruption and Economic Crimes Act, 2003 the ODPP has the mandate to prosecute criminal cases including all corruption and economic crime matters investigated by EACC. The ODPP also gives directions to EACC over the investigation of corruption and economic crime matters,

³⁰ This recommendation has since been addressed, through the Ethics and Anti-Corruption Commission (Amendment) Act, 2015. Section 6 of the Act provides for the vetting of all the employees of the Commission within one year of the appointment of (EACC) Commissioners, using a vetting criterion to be determined by the Commission. The services of any employee who fails to meet the vetting criteria established by the Commission shall be terminated in accordance with the contract of employment.

³¹ Cf: ODPP has already developed *Guidelines for the Prosecution of Corruption and Economic Crimes* (2015), and a *Code of Conduct for Prosecutors* (2015), to ensure objectivity in the execution of their mandate.

³² For more information on the mandate, powers, functions, activities and reporting obligations of ODPP, visit: www.odpp.go.ke.

and to the CID over the investigation of some economic crime cases. ODPP also executes Mutual Legal assistance (MLA) requests from other countries and initiatives and prosecutes extradition proceedings. Currently, ODPP has offices in Nairobi (headquarters) and in all the 47 counties and 16 sub-counties in Kenya. ODPP has a dedicated division for prosecuting corruption and economic crimes (Anti-Corruption and Economic Crimes Division) under its Economic, International and Emerging Crimes Department.

According to Section 35 of ACECA and 11(d) of the EACC Act, cases investigated by EACC are supposed to be referred to the Director of Public Prosecutions (DPP) for prosecution or appropriate directions. Upon receipt of a report from EACC, the DPP may direct prosecution, further investigations, administrative action or closure of a file depending on the assessment of the available evidence. Currently, the concurrence rate of the DPP with EACC recommendations for prosecution is more than 90%.

On his part, the DPP is required, under Section 37 of ACECA, to prepare and submit to the National Assembly, an annual report (1st January to 31st December) on action taken and the status of the prosecution of cases investigated and submitted by EACC.³³ The DPP also undertakes applications, revisions and appeals in appropriate cases, on criminal matters touching on corruption and economic crime.

3.4.3 Observations by the Task Force.

The Task Force noted that the prosecution of corruption and economic crime cases faces a number of challenges. These are:

- (a) Delay in the conclusion of cases prosecuted (due to a variety of reasons such as: preliminary objections by the Defence in the form of judicial review applications and constitutional petitions; hostile, uncooperative and unavailable witnesses; shortage of Special Magistrates/anti-corruption courts, frequent transfers of magistrates, high turnover of investigators; bottlenecks in extradition and the provision of MLAs)
- (b) Limited capacity to prosecute complex cases; and
- (c) Delay in the submissions of files by the investigative agencies.

ODPP indicated that some of the challenges are already being addressed through various interventions, such as:

- (a) An independent ODPP with a new structure.
- (b) Establishment of a dedicated Division for Prosecution of Corruption and Economic Crimes.
- (c) Continued recruitment of staff.
- (d) Capacity-building, hiring and training of Prosecution Counsel, acquisition of offices and equipment.
- (e) Decentralisation of prosecution services to the 47 counties and 16 sub-counties in the country.
- (f) Formulation of Anti-Corruption Prosecution Guidelines.
- (g) Professionalization of the prosecution of all cases of corruption and economic crimes.
- (h) Enhanced inter-agency co-operation with EACC and other law enforcement agencies.

³³ See for example: Office of the Director of Public Prosecutions, *Annual Report by the Director of Public Prosecutions in Respect of Prosecution of Corruption and Economic Crime Related Cases Pursuant to the Provisions of Section 37 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 for the Period 1st January, 2014 to 31st December, 2014* (Nairobi: Office of the Director of Public Prosecutions, April, 2015). See also: <http://www.odpp.go.ke/dmdocuments/Annual%20Report%20Final%20Anti-Corruption%2024th%20April%202015.pdf> (accessed on 28th June, 2015).

- (i) Enhanced stakeholder collaboration in the fight against corruption.
- (j) Undertaking prosecution-led investigations in liaison with EACC.
- (k) Automation of operational processes.

3.4.4 Prosecution of Corruption and Economic Crimes: A comparative analysis

The Task Force considered a number of issues touching on the work of the ODPP. The most pressing issue was the question as to whether or not EACC should be granted prosecutorial powers as part of their mandate. The issue generated a lot of interest and lengthy submissions from ODPP, EACC and other members of the Task Force. In order to examine the matter in a sober way, the Task Force considered a number of models:-

a) The Kenyan Model

The current Kenyan model is conceptualized along a shared responsibility in the fight against corruption. It encompasses investigations (enforcement) by EACC, prosecution by ODPP and adjudication by the Judiciary. This model seems to be working well and the preponderant view was that it be retained. As such, there were few adverse comments made about the effectiveness or otherwise on the ODPP's capacity to prosecute corruption cases.

Nonetheless, there has been a strong push by a section of the public, including the EACC and some civil society organisations to grant EACC prosecutorial powers. The current model, however, seems to be favoured by a number of stakeholders since it gives the DPP a chance to review the recommendations of EACC, to ensure that persons who deserve prosecution are prosecuted on the basis of law and evidence, bearing in mind the legal, social and political consequences of being arraigned in court over corruption and economic crime allegations. The DPP acts as a check against the possible abuse of the investigative powers of the EACC.

Under Article 157(9) of the Constitution of Kenya, the DPP may delegate prosecutorial powers to other entities, with general or specific instructions. This provision may be employed by the DPP to appoint some EACC legal officers as prosecutors over minor corruption and economic crime matters. The DPP would, however, retain a supervisory role in respect to this category of prosecutions. Under Article 157 (12) of the Constitution, Parliament (National Assembly) may pass legislation to grant other public bodies prosecutorial powers, other than the DPP.³⁴ Where such power is granted to other institutions, it may be desirable that the DPP retains an oversight role in order to ensure coherence and accountability over the exercise of the prosecutorial function of the State.

Looking at the history of the constitution-making process in Kenya, there was a strong movement to have an independent DPP who would be the focal point for the execution of the prosecutorial function of the state. This explains why the prosecutorial function was transferred from the AG under the former constitutional dispensation, because the AG was not seen as functionally-independent since he was a member of the Cabinet. Article 157(10) of the Constitution of Kenya, 2010, now secures the independence of the DPP thus: "The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority".

The issue of granting prosecutorial powers to EACC was discussed at length during the High Level Segment Retreat of the Task Force held at the North Coast Beach Hotel, Mombasa, 26-

³⁴Cf.: In *Stephen Mburu Ndiba v. Ethics and Anti-Corruption Commission and the Director of Public Prosecutions* [2015]eKLR, Justice Jairus Ngaa interpreted Section 32 of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), to mean that the Section grants EACC prosecutorial powers over corruption and economic crime matters, when read alongside Article 157 (12) of the Constitution. However, the decision was not quite clear as to whether EACC could undertake prosecutions without reference to the DPP.

27 June, 2015, during a session chaired by Mr. Ahmed Isaack Hassan, EBS, the Chairman of the Independent Electoral and Boundaries Commission (IEBC).³⁵

In his presentation to the Task Force on 26th June, 2015, the Director of Public Prosecutions (Mr. Keriako Tobiko, CBS) demonstrated to the Task Force that ODPP had the capacity and the resources to effectively undertake prosecution of corruption and economic crime matters investigated by EACC, without fear or favour. In particular, the DPP informed the Task Force that ODPP had offices in all the 47 counties of the Republic and 16 sub-counties. The ODPP had also established a dedicated Division to deal with Corruption and Economic Crimes. The DPP argued that granting prosecutorial power to EACC on the basis that the ODPP lacks capacity would merely amount to transferring institutional capacity constraints from the ODPP to EACC.

On the other hand, the case for granting EACC prosecutorial powers was supported by a few Members of the support, as well as the two experts who had initially served as Directors/Chief Executives of KACC, namely: Prof. P.L.O Lumumba and Justice Aaron G. Ringera, E.B.S. The Secretary/CEO of EACC contended that EACC would not insist on prosecutorial powers if measures were put in place by the ODPP to enhance its efficiency and accountability over the prosecution of corruption and economic crime cases investigated by EACC.

Eventually, the Task Force resolved, by consensus, that in the interest of the due process, fair trial, and ensuring objectivity and impartiality in the fight against corruption, ODPP should continue to prosecute corruption and economic crime cases. Nonetheless, the Task Force indicated that ODPP should enhance its mechanisms for accountability, including setting out within the public domain the criteria on which each case is prosecuted or rejected. It was agreed that ODPP would be required to file quarterly reports on the action taken over matters referred to it (ODPP) by EACC for prosecution. Currently, only EACC is required to file such quarterly reports under ACECA. ODPP agreed to this procedural proposal.

Even though the current Kenyan model was adopted following some lengthy consultations, the Task Force considered other models for comparative purposes.

b) Hong Kong, Singapore, and Mauritius Models

The Kenyan model mirrors that of Hong Kong Special Administrative Region SAR whereby the Independent Commission against Corruption (ICAC) investigates cases and the Department of Justice undertakes the prosecutions.³⁶ The same model is employed in Singapore (by the Prevention of Corruption Bureau) and in Mauritius (by the Independent Commission against Corruption (ICAC)). The Mauritius ICAC was established in 2002, through the Prevention of Corruption Act and fights corruption through investigations, prevention and education. The prosecution of cases investigated by ICAC is undertaken by the Director of Public Prosecutions (DPP). The DPP has the sole responsibility of deciding whether to initiate court proceedings or not. He is independent and not subject to the authority of any other person or authority.

c) The Kenya Anti-Corruption Authority (KACA) Model

Following the establishment of the Kenya Anti-Corruption Authority (KACA) in 1997 after an amendment to the then Prevention of Corruption Act (now repealed), KACA would prosecute cases with the consent of the AG, who under the former constitutional dispensation was responsible for criminal prosecutions. KACA discharged this mandate until 22nd December,

³⁵ See: Office of the Attorney-General and Department of Justice, *Resolutions of the High Level Segment of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya*, held at the North Coast Beach Hotel, Mombasa, 26-27 June, 2015.

³⁶ On the Independent Commission against Corruption (ICAC) of Hong Kong SAR, see generally: www.icac.org.hk. See also: Bertrand de Speville, *Hong Kong: Policy Initiatives against Corruption*, (Paris: Development Centre of the Organization for Economic Co-operation and Development, 1997).

2000, when it was declared unconstitutional by the High Court of Kenya, through the infamous case of *Gachiengo v. Republic*³⁷ for allegedly usurping the prosecutorial powers of the AG and the investigative “constitutional” functions of the Commissioner of Police.³⁸ The successor institutions to KACA, that is the Anti-Corruption Police Unit (ACPU), the Kenya Anti-Corruption Commission (KACC), and the current EACC, have not been vested with such prosecutorial powers. However, the High Court in the case of *Meme v. R*³⁹ seemed to depart from the reasoning in the *Gachiengo case* and held, *inter alia*, that it was not unconstitutional to establish dedicated courts to deal with corruption offences.

This model is also in use in Tanzania, and Botswana. And in the case of Botswana, the Directorate on Corruption and Economic Crime (DCEC) investigates and prosecutes with the consent of the AG.⁴⁰ Thus, the decision to prosecute rests with the AG, under which the Director of Public Prosecutions falls, as was the case in Kenya under the former constitutional dispensation. The DCEC also carries out public education and prevention of corruption.

d) British Model

In the United Kingdom (UK), the Serious Fraud Office (SFO) has both investigative and prosecutorial functions. The SFO carries out this function independently of any other office or authority.

e) Danish Model

In Denmark, the Ministry of Justice is tasked with the responsibility of policy formulation and making legislative proposals on the fight against corruption. In terms of enforcement and prosecution of corruption matters, the Public Prosecutor for Serious Economic and International Crime is mandated to investigate and prosecute corruption and other economic crimes.

f) Norway

In Norway, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime handles both investigation and prosecution of corruption matters.

g) Other Models

Just like in the UK, Norway and Denmark, anti-corruption bodies in Uganda, Rwanda, Nigeria and Sierra Leone do also enjoy both investigative and prosecutorial functions. In particular, in the case of Rwanda, Section 13 (of Law No. 76 of 2013) empowers the Ombudsman and Deputy Ombudsmen in the Office of the Ombudsman (Rwanda’s anti-corruption body) to prosecute all offences in relation to the mission of the Office. Other officers in the Office may also prosecute subject to the approval of the Ombudsman Council and an Order of the Prime Minister.⁴¹

3.4.5 Recommendations of the Task Force

- a) The current arrangement whereby EACC investigates, ODPP prosecutes, and the Judiciary adjudicates over corruption and economic crime cases should be continued as it ensures due process, fair trial, objectivity, impartiality and**

³⁷ See generally: *Gachiengo & Anr v. R.* [2000]eKLR (available in: www.kenyalaw.org)

³⁸ Under the former constitutional dispensation, the investigative functions of the Police arose from the Police Act (*Cap.* 84) as opposed to the Constitution. The Constitution only provided for the appointment of the Commissioner of Police. Under the current constitutional dispensation, the Commissioner of Police has been replaced with the Inspector-General of Police, by virtue of Article 245(1) of the Constitution of Kenya, 2010.

³⁹ *Meme v Republic & Another* (2004) 1 KLR 633.

⁴⁰ Under the Corruption and Economic Crimes Act (1994) of Botswana, the Directorate of Corruption and Economic Crimes (DCEC) also enforces the Proceeds of Serious Crime, 2000, which provides for the confiscation of the proceeds of corrupt deals or contracts.

⁴¹ See: https://www.ombudsman.gov.rw/IMG/pdf/itegeko_rigenga_urwego_rw_umuvunyi1.pdf

provides the necessary checks and balances in the fight against corruption. Some of the least corrupt countries in the world, such as Hong Kong SAR, Singapore, Mauritius, and Botswana separate their investigative and prosecutorial functions. According to Bertrand de Speville,⁴² a former Deputy Commissioner of ICAC (Hong Kong), “the advantage of leaving the decision to prosecute to an outside authority is that it reduces the risk of oppressive conduct on the part of the anti-corruption agency”.⁴³ Thus, the preponderant best practice is to separate the investigative and prosecutorial powers.

- b) ODPP should publish quarterly reports on the prosecution or other actions taken over corruption and economic crime cases referred to it by EACC and other investigative agencies. Consequently, the Anti-Corruption and Economic Crimes Act, 2003 should be amended to reflect that position.
- c) The Government should strengthen the capacity of ODPP and fund it at appropriate levels to enable it to efficiently and effectively prosecute corruption and economic crime cases.
- d) When EACC forwards a file to the DPP, the DPP shall make a decision as to whether or not to prosecute within thirty (30) days and where the DPP has not accepted a recommendation by EACC to prosecute, the DPP shall communicate the decision to EACC with reasons thereof.
- e) ODPP should have specially trained and skilled prosecutors who exclusively prosecute corruption and economic crimes cases. Thus, the capacity of its Anti-Corruption and Economic Crimes Division should be enhanced with sufficient resources, manpower and skills.

3.5 The Judiciary

3.5.1 Legal and Constitutional Status of Judiciary

The Judiciary is one of the three Arms of Government. It is established under Chapter 10, Article 159 of the Constitution of Kenya, 2010. Thus, the Constitution establishes the Judiciary as an independent custodian of justice in Kenya with its primary role being to exercise the judicial authority of the people of Kenya.

3.5.2 Mandate

The Judiciary derives its mandate from the Constitution of Kenya, vide Article 159. The Judiciary is mandated to dispense justice in line with the Constitution and other laws and is expected to resolve disputes in a just and fair manner with a view to protecting the rights and liberties of all Kenyans. The Judiciary and its related institutions (Judicial Service Commission (JSC), the National Council on Law Reporting (NCLR) (commonly referred to as “Kenya Law”), tribunals, and the Judiciary Training Institute (JTI) perform the following functions:—

- i) Administration of justice;
- ii) Formulation and implementation of judicial policies; and
- iii) Compilation and dissemination of case law and other legal information for the effective administration of justice.

⁴²Bertrand de Speville (1997), *supra*, f.n. 360

⁴³*Ibid.*, p. 73. See also: Bertrand de Speville(1999): *The Kenya Anti-Corruption Authority and its Role in Kenya's National Integrity Plan: A Report for the Kenya Anti-Corruption Authority of the Visit of Mr. B.E.D. de Speville to Nairobi*, 25th November – 4th December, 1999, (Nairobi: Kenya Anti-Corruption Authority, 1999).

The courts operate at two levels, namely: Superior and Subordinate Courts - as stipulated in the Constitution. The Superior Courts consist of the Supreme Court, the Court of Appeal and the High Courts. The Courts provided for in Article 162 (1) and (2) of the Constitution are:

i) Supreme Court

The Supreme Court of Kenya (SCK) is established under Article 163 of the Constitution of Kenya. It comprises seven judges: the Chief Justice (CJ) (who is the President of the Court; the Deputy Chief Justice (DCJ) (who is also the Vice-President of the Court), and five other judges. The Supreme Court has jurisdiction in two broad areas— (a) determining disputes arising out of Presidential elections, and (b) listening to appeals emanating from the Court of Appeal and any other court or tribunal as prescribed by legislation.

ii) Court of Appeal

The Court of Appeal (CA) is established under Article 164 of the Constitution of Kenya, 2010. It consists of a number of judges to be prescribed by an Act of Parliament.⁴⁴ The Court is organized and administered in the manner prescribed by an Act of Parliament. The Court has a Presiding Judge who is elected by the judges comprising the Court. The Court's jurisdiction is to hear appeals from the High Court and from other courts and tribunals as prescribed by law.

iii) High Court

The High Court is established under Article 165 of the Constitution. Article 165(1) states that the High Court shall be composed of the number of judges prescribed by an Act of Parliament. Consequently, Section 7(2) of the Judicature Act has set the ceiling of the number of High Court judges as one hundred and fifty (150). Article 165(2) provides that the Court shall be organized and administered in the manner prescribed by an Act of Parliament. The High Court Organization and Administration Bill, which seeks to operationalize this provision of the Constitution, has already been submitted to Parliament for debate and enactment. Administratively, the Chief Justice has restructured the High Court into a number of divisions, namely: Commercial and Admiralty Division; Criminal Division; Civil Division; Family Division; Judicial Review Division, and the Constitution and Human Rights Division.

The jurisdiction of the High Court is conferred by Article 165(3) of the Constitution. In particular, the High Court has unlimited original jurisdiction in criminal and civil matters.⁴⁵ As such, the High Court handles criminal matters in exercise of its original or appellate jurisdiction. It is noteworthy that under Article 165(3)(e) of the Constitution, the High Court may exercise "any other jurisdiction, original or appellate, conferred on it by legislation". Thus, it is possible to grant the High Court a special jurisdiction to deal with corruption and economic crime matters, within the purview of Article 165(3) (e). However, the jurisdiction of the High Court does not extend to matters reserved for the exclusive jurisdiction of the Supreme Court⁴⁶ or falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.⁴⁷ Article 162 (2) (a) and (b) of the Constitution establishes other courts with the status of the High Court: the Employment and Labour Relations Court, and the Environment and Land Court.

⁴⁴ The Judicature Act, Cap. 8 Laws of Kenya. Cf. Section 7(2) of the Act states that the Court Appeal shall have "not more than thirty judges."

⁴⁵ Article 165(3) (a) Constitution of Kenya.

⁴⁶ Article 165(5) (a), *Ibid.*

⁴⁷ Article 165(5) (b), *Ibid.*

iv) Subordinate Courts

Subordinate courts are established under Article 169 of the Constitution and consist of the Magistrates' Courts, Kadhis Courts, Court Martial, and any other court or local tribunal established by an Act of Parliament.

3.5.3 Situational Analysis

In 2002, the then Chief Justice, Justice Bernard Chunga, EGH, launched the Anti-Corruption Court under the existing arrangement of Subordinate Courts. The court was established for the purpose of handling cases of corruption and was to exercise the same jurisdiction as magistrate's courts as set out in various statutes. Subsequently in 2003, ACECA was enacted. Section 3 of the Act provides for the appointment of special magistrates by the CJ to handle corruption and economic crimes and related offences. Section 4 of the Act provides for cases triable by special magistrates and Section 5 provides for procedure and powers of special magistrates. Following the recent gazettelement of 160 magistrates in 2012 and 2013 by the current CJ to hear corruption cases, there are now special magistrates in every county to hear corruption cases.

In 2012, the Judiciary launched the Judiciary Transformational Framework (JTF). The Framework, under Pillar II and Key Result Area (KRA) 4, seeks to entrench a culture of integrity devoid of unethical practices. As was common knowledge, the Judiciary was for a long time viewed as a market place where justice was on sale to the highest bidder. The JTF seeks to rid the institution of this vice and perception. Tremendous positive outcomes have resulted from this effort and it is now evident that we have a more open and transparent Judiciary where decisions can be interrogated and any cases of impropriety are dealt with expeditiously and decisively.

3.5.4 Observations by the Task Force

The Task Force noted the following:

- a) The adjudication of corruption and economic crime cases is very slow. The average rate of disposal for the cases is one case for a period of over three years. This is so despite the provisions of ACECA, which expressly provides for the hearing of corruption and economic crime cases on a day-to-day basis.
- b) The Task Force further noted that the Anti-Corruption Courts were no longer as specialized as was earlier envisaged since they are being allocated other court matters for hearing and determination.
- c) There was a problem of backlog of corruption and economic crime cases occasioned by numerous petitions and miscellaneous applications persists.
- d) There is a serious lack of capacity and training for judicial officers in the adjudication of corruption, economic crimes and related cases.
- e) Frequent transfers special Magistrates when they are in the middle of hearing. Noting that corruption cases are lengthy, this disrupts the expeditious disposal of cases. As a consequence of this, some cases have to be heard *de novo*.
- f) Recording of proceedings of Anti-Corruption cases is manual hence time-consuming.
- g) Most of the corruption cases are filed in the Anti-Corruption Court in Nairobi, which tends to overburden the station.

3.5.5 Recommendations of the Task Force

In order to strengthen the judicial framework for the expeditious adjudication of corruption and economic crimes cases, the Task Force recommends that:

- a) The Chief Justice should issue and enforce guidelines to ensure Magistrates handling corruption matters hear such matters on a daily basis as per the provisions of Section 4(4) of ACECA. A magistrate dealing with corruption matters should not handle other matters until the corruption matters they are seized of are concluded.
- b) Magistrates assigned to corruption cases should be, as far as possible, designated from and based in each of the 47 counties across the country to avoid overburdening one station (Nairobi).
- c) The Judiciary should develop a robust capacity building and training program for judicial officers on adjudication of corruption, economic crimes and related matters.
- d) Modernization and digitalization of Court proceedings to expedite disposals of cases should be expedited.
- e) The need for the courts to put into practical use conviction-based recovery of assets for corrupt culprits. Once a person is convicted of a corrupt offence, the court handling the matter should proceed to order confiscation of the corruptly-acquired property.
- f) The CJ should commission a study, under the auspices of the National Council on Administration of Justice (NCAJ), for the purposes of determining the appropriate mechanism for addressing the backlog of corruption and economic crime cases caused by a plethora of constitutional references or judicial review applications in corruption and economic crime matters, which tend to stall the hearing and determination of corruption and economic crime cases for years.
- g) The CJ should consider setting up a division of the High Court with original jurisdiction to hear corruption and economic crime matters to avoid the delays occasioned by accused persons going to the High Court with Judicial Review applications and constitutional references that end up delaying the prosecution of corruption and economic crimes cases.
- h) Consideration should be made to amend ACECA, to vest the High Court with a special jurisdiction to hear corruption and economic crime cases. Article 165(3) (e) of the Constitution provides that the High Court shall “have any other jurisdiction, original or appellate, conferred on it by legislation”. This would grant the High Court seized of a corruption and economic crime matter to handle any attendant miscellaneous applications, such as judicial review or over alleged violation of human rights, which may be raised before or during the hearing of the matter.
- i) The state should ensure that the Judiciary has adequate financial provisions in the budget so that it can build its capacity in terms of ensuring that the judicial staff it recruits are well-trained and remunerated to facilitate the expeditious disposal of cases.

3.6 Office of the Attorney-General and Department of Justice (OAG&DOJ)

3.6.1 The Role of OAG&DOJ in the Fight against Corruption

OAG&DOJ is one of the key actors in the fight against corruption in Kenya. It maintains ministerial oversight over anti-corruption, ethics and integrity issues and facilitates the work of various anti-corruption bodies through the provision of an enabling legal and policy framework, as well as the necessary local and international linkages necessary for ensuring

that all anti-corruption efforts in the country are geared towards achieving zero tolerance for corruption in the country.

3.6.2 Legal and Constitutional Status

OAG&DOJ was established pursuant to Executive Order No. 2 of 2013 on the *Organisation of the Government of the Republic of Kenya*, when H.E. the President constituted his Cabinet following the 4th March, 2013 general elections.⁴⁸ Thus, OAG&DOJ came into existence in May, 2013, following the merger of the then Office of the Attorney-General (OAG) and the former Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA).⁴⁹ It is noteworthy that the post of the Attorney-General is constitutional by virtue of Article 156 of the Constitution. On the other hand, OAG is established under the Office of the Attorney-General Act, 2012⁵⁰ (OAG Act). The OAG Act sets out in detail, the mandate and functions of OAG. On its part, MOJNCCA had been established by the President in 2003, in accordance with the powers vested on the President, under the former constitutional dispensation.

3.6.3 Mandate

OAG&DOJ is mandated to, *inter alia*: promote the rule of law and public participation; support Government's investment in socio-economic development; promote transparency, accountability, ethics and integrity; spearhead policy, legal and institutional reforms; promote economic governance and empowerment; promote the fulfilment and protection of human rights; undertake administrative management and capacity building; and enhance access to justice.

3.6.4 Functions

Pursuant to *Executive Order No.2 of 2013*, Article 156 of the Constitution and the OAG Act, 2012, the core functions for the OAG&DOJ include: representing the national Government in court or in any other legal proceedings to which the national Government is a party, other than in criminal proceedings; undertaking civil litigation, arbitration, and alternative dispute resolution on behalf of the Government. Other functions of OAG&DOJ include, to:- review and oversee legal matters pertaining to Public Trustee and administration of estates and trusts; negotiate, draft and vet local and international instruments, treaties and agreements involving the Government and its institutions; adjudicate over complaints made against practicing advocates, firms of advocates, a member or employee thereof and where necessary ensuring that disciplinary action is taken; undertake drafting of bills, subsidiary legislation, notices of appointment to state corporations, Constitutional offices and public offices, and review of laws. Additionally, OAG&DOJ undertakes the reviewing and overseeing of legal matters pertaining to registration of companies, business names, societies, adoptions and marriages.

Through its Department of Justice (DOJ), OAG&DOJ provides policy on administration of justice; legal policy management; legal aid and advisory services; legal education and training; political parties policy management; elections policy management; anti-corruption strategies, integrity and ethics; and constitutional affairs. In addition, OAG&DOJ has been dealing with a number of major governance issues aimed at combating corruption.

3.6.5 Major Areas of Good Governance Intervention

Over the years, OAG&DOJ (and its precursor institutions) has realised some significant achievements which have made a significant contribution to the fight against corruption:

⁴⁸Republic of Kenya: *Organisation of the Government Republic of Kenya*, (Executive Order No. 2/2003) (Nairobi: The Presidency, May, 2013).

⁴⁹ Office of the Attorney-General and Department of Justice, *Strategic Plan: 2013-2017*, (Nairobi: Office of the Attorney-General and Department of Justice, June, 2015), at p. 1.

⁵⁰ The Office of the Attorney-General Act, 2012 (Act No. 49 of 2012).

(a) Adoption of the Constitution of Kenya, 2010

Some of the key achievements include the promulgation of the Constitution (2010), establishment of various commissions and committees particularly related to implementation of the Constitution; implementation of various programs especially around preparedness in the run-up to the 2013 elections; and the enactment of laws as set out in the Fifth Schedule of the Constitution.

(b) Establishment of Independent Commissions

As part of its leading role in the implementation of the Constitution, OAG&DOJ contributed to the realization of devolution through development of necessary legislation, policies and establishment of institutions such as: CIC; Transitional Authority (TA); National Gender and Equality Commission (NGEC); Commission for Revenue Allocation (CRA); Independent Electoral and Boundaries Commission (IEBC); EACC, etc. Additionally, OAG&DOJ has overseen the successful conclusion of the Truth, Justice and Reconciliation (TJRC) process, and the holding of peaceful elections under the new Constitution, among other initiatives. Additionally, OAG&DOJ re-branded NACCSC so that it has enough capacity to deliver on its mandate. OAG&DOJ has also enhanced the effectiveness of the Governance, Justice, Law and Order Sector (GJLOS) in service delivery to Kenyans through efficiency improvements.

(c) Enactment of Anti-Corruption laws

OAG&DOJ has been a key actor in processes geared towards the development of an effective legal framework for fighting corruption. Towards that, OAG&DOJ has facilitated the enactment of laws such as: the Leadership and Integrity Act, 2012 (No. 19 of 2012), and the EACC (Amendment) Act, 2015, among others.

(d) Implementation of the United Nations Convention against Corruption

It is noteworthy that Kenya was the first country to sign and ratify UNCAC when it was opened up for signature and ratification in Merida, Mexico on 9 December 2003. UNCAC has now acquired near-universal application as it now has 140 signatories and 173 States Parties. Since 2013/2014, Kenya has been undergoing a review of its implementation of UNCAC. The review has been under the co-ordination of OAG&DOJ, under the aegis of a National Steering Committee on the Review of UNCAC appointed by AG on 24th July, 2013. Besides UNCAC, Kenya is a State Party to AUCPCC. Kenya's membership of these anti-corruption instruments has helped the country develop appropriate legal instruments that compare well with international best practices and standards on the fight against corruption and the promotion of ethics and integrity in the public service and the society generally.

(e) Assets Recovery

On asset recovery, OAG&DOJ has established the Assets Recovery Agency (ARA), in line with the provisions of POCAMLA. ARA is mandated to undertake criminal and civil assets forfeiture (proceeds of crime, confiscation orders, restraint orders, realization of property, etc.).

(f) Creating a Conducive Environment for Doing Business

OAG&DOJ has been, and continues to implement wide-ranging reforms which are part of the Government's efforts towards enhancing the business registration regime to improve the ease of doing business. Some of these reforms include: reforms to the Companies Registry (registration of companies and business names can now be done within 24 hours); a call centre (0701 155 955) was set up to deal with any company or business registration queries; and digitization and scanning of records at the Societies Registry to ease registration and filing of returns or response to enquiries.

3.6.6 Challenges

Corruption continues to be a major national challenge in Kenya. This has been occasioned by slow enactment of pieces of enabling legislations; inadequate capacity of various anti-corruption agencies; lack of or co-operation in the provision of MLA in the investigation or prosecution of matters with some international dimensions; slow implementation of various anti-corruption strategies; lack of public participation in the fight against corruption, and wavering support of Politically Exposed Persons (PEPs) in the fight against corruption.

3.6.7 Recommendations of the Task Force

In order to create an enabling environment for effective policy onslaught against corruption and the promotion of ethics and integrity, the Task Force recommends that OAG&DOJ carries out the following measures in the short to the long term:

- (a) Strengthen the legal policy framework for anti-corruption, ethics and integrity.**
- (b) Facilitate the enactment of the Whistleblower Protection Act and the Freedom of Information Act.**
- (c) OAG&DOJ, in consultation with EACC, ODPP, the Judiciary, and the Kenya Law Reform Commission (KLRC), and other stakeholders in the fight against corruption, should undertake regular reviews of various anti-corruption laws and regulations, with a view to strengthening the legal, policy and institutional framework for fighting corruption in Kenya.**
- (d) OAG&DOJ to steer the inter-agency co-operation among institutions involved in the fight against corruption and facilitate monthly or regular meetings of heads of agencies to review progress in implementation and submit quarterly reports to the President.**
- (e) OAG&DOJ to coordinate the development of programmatic engagements in line ministries to instil anti-corruption measures including curriculum development for formal and vocation training; training of public officers in ethics and integrity; enhancing the role of religious institutions, private sector, professional associations and non-state actors in anti-corruption initiatives; reporting on anti-corruption targets and initiatives across Government; monitoring implementation and reporting on corruption perception survey findings; in-build anti-corruption sensitization and measures in Government programming that engages the general civilian populace; developing (in collaboration with EACC and line ministries) distinct codes of conduct for professional and non-professional cadres in the public service, and co-ordination/monitoring implementation of Chapter 15 reports.**
- (f) Influencing the business community on integrity and anti-bribery standards to encourage businesses to uphold high standards of ethics and integrity.**
- (g) In collaboration with the Financial Reporting Centre, intensifying work to address international aspects of corruption including money laundering.**
- (h) Integrate anti-corruption policies in the drafting of all laws at the national level and provide guidance to county governments to do the same for their respective Counties.**
- (i) Facilitate the integration of anti-corruption clauses in all Government contracts (at international, national and county levels) and review standard contract document templates and tender documentation to guard against loss of public resources.**

- (j) **Review of all contracts over KSh. 500 million including procurement processes and award, due diligence and financing frameworks between 7 and 14 days of submission and receipt of requisite documentation from line ministries.**
- (k) **Facilitate the review of the implementation of the United Nations Convention against Corruption (UNCAC), and the African Union Convention on Preventing and Combating Corruption (AUCPCC) and the implementation of the ensuing country review reports.**
- (l) **Facilitate the signing and ratification of new or outstanding international and regional anti-corruption instruments.**
- (m) **Enhance the implementation of the Public Officer Ethics Act, 2003, and the Leadership and Integrity Act, 2012.**
- (n) **Facilitate the implementation of the amnesty and restitution provisions (Sections 25A and 56B) of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) and the review of the Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulations, 2011.**
- (o) **Consolidate all anti-corruption laws into one body of anti-corruption law.**
- (p) **Review and consider legislative proposals for plea-bargaining within the framework of ACECA.**
- (q) **In consultation with EACC and other stakeholders, facilitate the establishment of a National Anti-Corruption Academy (NACA) to offer specialized training to officers involved in the fight against corruption.⁵¹**
- (r) **Facilitate the conclusion of a regional protocol for preventing and combating corruption in East Africa.**
- (s) **Mainstream the fight against corruption in the management of public affairs.**
- (t) **Develop mechanisms for putting to an end to the emerging trend of some Parliamentarians seeking immunity from corruption charges.**
- (u) **Review the regulatory framework for the registration and operation of companies and businesses to ensure that persons or companies implicated in corruption are not allowed to register or operate companies or businesses.**
- (v) **Accelerate the processing of Mutual Legal Assistance (MLA) requests to and from Kenya relating to the fight against corruption and economic crimes.**
- (w) **Facilitate the consolidation of various anti-corruption laws for ease of reference and implementation.**
- (x) **Facilitate regular review of the legal, policy and institutional framework for fighting corruption in Kenya.**

3.7 Parliament

3.7.1 Legal and Constitutional Status of the Parliament.

Chapter Eight of the Constitution of Kenya (the Constitution) establishes the Legislature. Article 93 of the Constitution provides that “There is established a Parliament of Kenya,” (Parliament) “which shall consist of the National Assembly and the Senate.” The two Houses

⁵¹ It is noteworthy that Kenya School of Government offers short courses on leadership, anti-corruption, ethics and integrity, mainly targeting public officers from the national and county governments. Such courses are introductory and would be different in terms of content and methodology from those to be offered in the proposed NACA.

of Parliament are required to perform their respective functions in accordance with the Constitution as stated in Article 93 (2) of the Constitution. Section 3(2) of the Public Officers Ethics Act, 2003, provides that the Committee of the National Assembly responsible for the ethics of Members (the National Assembly Committee on Powers and Privileges) is the responsible Commission for Members of Parliament for purposes of enforcing POEA.

3.7.2 Mandate

The passing of the Constitution of Kenya, 2010 ushered in new structures and institutions in Government. The Constitution, 2010 established a bicameral legislature consisting of the National Assembly and the Senate composed of 350 and 68 members respectively. The key roles of the National Assembly include:- enacting legislation; representing the people of Kenya (including special interests groups); deliberating on and resolving issues of concern to the people; determining the allocation of national revenue between levels of Government; exercising oversight over national revenue and expenditure, reviewing the conduct in office of the President, the Deputy President, and other state officers and approval of declarations of war and of states of emergency.

The key roles of the Senate are: to represent the counties and the interests of the counties and their governments; participate in law-making by considering, debating and approving Bills concerning counties; determining allocation of national revenue among counties exercise oversight over national revenue allocated to county governments and participate in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office.

3.7.3 Observations of the Task Force

The Task Force has observed the following with respect to Parliament:

- a) Political differences and diverse party views that negatively affect the debate and passing of legislation in the Houses.
- b) Delays on the debate and recommendations on Reports brought to the two Houses for approval and further implementation.
- c) In the past, Parliament (the National Assembly) has in the past acted *ultra vires* by enacting legislation or voting to remove anti-corruption officials it has a difficult working relationship with. For instance, in September 2011, Parliament voted to remove the then serving Director and Assistant Directors of KACC. On 9th July, 2015, the National Assembly amended the EACC Act, 2011, to provide for, *inter alia*, the vacation of the offices of the Secretary/Chief Executive, and the Deputy Secretary, of EACC, yet the responsibility to remove such officers is vested in the Commission (EACC) and not the National Assembly.⁵² Although EACC, like all other constitutional commissions and independent offices reports to the President and to Parliament in terms of Article 254 of the Constitution, the EACC is operationally independent, as per the provisions of Article 79 and Chapter 15 of the Constitution.

3.7.4 Recommendations of the Task Force

The Task Force makes the following recommendations:

- d) **Expeditious implementation of recommendations made by Parliament regarding the utilization of public funds or upon consideration of regular or special reports**

⁵² The Speaker of the National Assembly, Hon. Justin Muturi, admitted that some of the amendments to the EACC Act passed by the National Assembly were unconstitutional but admitted that only the President could reverse the process by referring the Bill back to the National Assembly noting any reservations the President has concerning the Bill (as per Article 115(1) (b) of the Constitution. See: *The Daily Nation*, Nairobi, Friday, July 17, 2015, p. 10, col. 5. See also: *The Standard*, Nairobi, Friday, July 17, p. 16, col. 1.

submitted to Parliament by Constitutional Commissions, Independent Offices (Auditor-General, and Controller of Budget), EACC, and ODPP.

- e) **Ensure that candidates seeking Parliamentary approval for appointment as State officers are compliant with the provisions of Chapter Six of the Constitution, the Leadership and Integrity Act, 2012, the Public Officer Ethics Act, 2003, and the Public Appointments (Parliamentary Approval) Act, 2011.**
- f) **Fast-track recommendations for enactment of new laws or amendment of laws as may be proposed by OAG&DOJ, EACC, ODPP, the Judiciary; constitutional commissions, independent offices, regarding anti-corruption issues.**
- g) **Encourage collaboration with other enforcement agencies in the quick investigations and deliberations of matters of graft brought before it.**
- h) **Amend POEA to include the Senate Committee on Powers and Privileges as the responsible Committee for the ethics of Members of the Senate.**
- i) **Parliament (National Assembly or Senate) should facilitate the work of constitutional commissions and independent offices by granting them the necessary support for the execution of their duties, including acting on the reports of such bodies, as per the provisions of Article 254 of the Constitution.**
- j) **Establish a special joint committee of the House to strengthen the supervisory role of Parliament over the bodies in charge of the implementation of anti-corruption strategies.**
- k) **Reigniting the Kenyan Chapter of the African Parliamentarian Network against Corruption (APNAC) and restructuring all other Parliamentary initiatives on corruption, transparency and accountability.**
- l) **Political parties to adopt a code of ethics and integrity and vigorously enforce it. Personal integrity should be given due weight while enlisting members or giving tickets for election. These are mandatory minimum measures for establishing credibility of the political institutions.**
- m) **Commitment to maintaining integrity in governance and combating corruption should be made a key election manifesto by all parties. Simultaneously, the electorate should also be educated and made aware to give due weightage to this manifesto and the integrity of candidates while casting their vote in elections.**

3.8 The National Treasury

3.8.1 Legal and Constitutional Status of the National Treasury

The legal and constitutional basis for the role of the National Treasury in fighting corruption, albeit indirectly, arises from the provisions of Chapter Twelve of the Constitution (on Public Finance), as well as the provisions of the Public Finance Management Act, 2012⁵³ (PFMA). Section 11 of the PFMA establishes the National Treasury under the headship of the Cabinet Secretary responsible for finance.

3.8.2 Mandate

The National Treasury is the Ministry of Government that is charged with formulating financial and economic policies on behalf of the Government. The Treasury regulates the financial sector by overseeing all financial operations of the government. The Accounting Officer in the National Treasury is the Principal Secretary.

⁵³The Public Finance Management Act, 2012 (No. 18 of 2012).

The National Treasury is vested with immense legal, policy and regulatory roles which seek to ensure that public funds are spent in a prudent and accountable manner and that proper checks and balances are put in place to guard against the misuse or embezzlement of public funds. Part VII of the PFMA outlines enforcement provisions including offences for financial misconduct and breach of regulations. It places a duty on principal secretaries and chief officers to report cases of misconduct and/or misappropriation. The National Treasury is mandated to institute civil proceedings to recover damages from a public officer for any loss for which the officer is liable as a result of negligence or corrupt practices. Further, Section 12(1) (e) of the PFMA provides that, the National Treasury shall, inter alia,

Design and prescribe an efficient financial management system for the national and county governments to ensure transparent financial management and standard financial reporting as contemplated by Article 226 of the Constitution: Provided that the National Treasury shall prescribe regulations that ensure that operations of a system under this paragraph respect and promote the distinctiveness of the national and county levels of government.

It is on the strength of the provisions of Section 12(1) (e) of the PFMA that the National Treasury has been able to roll out the Integrated Financial Management Information System (IFMIS) throughout the national government and the counties to ensure transparency and accountability in the management of public funds. This has led to a significant reduction of corruption and other corruption-related malpractices such as fraud and tax evasion.

In addition, Section 12(2) (a) of the Act grants the National Treasury additional functions, one of which is to, “promote transparency, effective management and accountability with regard to public finances in the national government”. This, therefore, means that the National Treasury is a key stakeholder in the fight against corruption and can play a significant role in preventing corruption, especially using the IFMIS system of financial management.

3.8.3 Observations of the Task Force

Prior to the adoption of the Constitution of Kenya, 2010, the Treasury was vested with the responsibility of allocating and overseeing the management of financial resources to all government departments. Treasury was also the custodian of the Consolidated Fund that serves as a pool of revenue collected on behalf of the government. The traditional role of Treasury as a regulator of the national fund has been reduced under the new Constitution following the creation of the Office of the Controller of Budget and the Office of the Auditor General. The Task Force also acknowledged that past governance initiatives supported by the Treasury, such as *Governance Strategy for Building a Prosperous Kenya*,⁵⁴ had yielded positive results in the fight against corruption and the promotion of good governance in the management of public resources.

The Task Force noted that the National Treasury faces a number challenges in the discharge of its mandate. For instance, the equitable distribution of the national kitty has become difficult due to the following:-

- (a) Allocation of funds to commissions and independent offices (commission budgets are allocated by the National Assembly with minimal consultation with the National Treasury).
- (b) Inadequate supervision over funds allocated to county governments under Article 203 of the Constitution.

⁵⁴Republic of Kenya, *Governance Strategy for Building a Prosperous Kenya*, (Nairobi: Ministry of Finance, 2006).

- (c) Inadequate supervision of funds allocated to Constitutional commissions and independent offices.
- (d) Inadequate supervision over procurement matters.
- (e) Conflict and competition from the National Assembly over disbursement of funds.
- (f) Inadequate disbursement of resources to the Public Procurement Oversight Authority.
- (g) Inordinate delays (due to bureaucracy) in making payments to ministries and government agencies.
- (h) Lack of IFMIS systems in the sub-counties.

3.8.4 Recommendations of the Task Force

The Task Force recommends the following:-

- a) The National Treasury should initiate investigations and thereafter institute civil proceedings against all officers who have since been found culpable of negligence and/or corrupt practices so as to recover any proceeds of corruption.**
- b) The National Treasury should ensure implementation of recommendations of the Auditor-General and Controller of Budget reports among implementing ministries, departments and agencies and initiate disciplinary and other administrative action as appropriate. The National Treasury should facilitate quarterly reporting to the PAC/PIC on actions taken in resolution of the said reports.**
- c) Strictly enforce provisions in the Government Financial Management Regulations including surcharge and restitution for officers found to be complicit in financial mismanagement and failure to account for public resources.**
- d) The National Treasury should undertake a detailed review of programmes and projects for purposes of examining efficiency and effectiveness, duplicity and non-essential expenditure.**
- e) The National Treasury should enhance adoption of the Open Government Initiatives for the purpose of publicisation of budgets and expenditure reports.**
- f) Carrying out additional cross-cutting analysis of corruption and fraud risks relating to every programme and project implemented across MDAs through project management committees established within each ministry.**
- g) The National Treasury should enhance the functions of and undertake spot-checks and audits on programmes through the Internal Audit divisions in all MDAs, Parliament, and the Judiciary and implement the audit recommendations for purposes of enforcing compliance with PFM regulations.**
- h) To recognize and reward the efforts of companies that voluntarily embody good anti-corruption policies, a system of “credits” should be introduced. Companies would be eligible to earn credits on various objective parameters. A framework should be evolved under which specific concessions or incentives should be made available to companies holding credits. Incentives could be in the form of additional points when evaluated for government contracts, priority clearances for major projects, governmental assistance or endorsement in tapping foreign markets, etc.**
- i) Introduction of IFMIS to the sub-counties.**

- j) **Create policies to enhance the use of e-procurement platforms and conclude the process of integrating all government financial management systems to create a one-stop-shop of financial data.**
- k) **Create policies to enhance capacity of the Financial Reporting Centre (FRC) including the incorporation of all professional bodies as reporting agencies.**
- l) **Create timelines for expeditious payments to ministries and government agencies.**
- m) **Prepare and publicize timelines and status of payment processes to suppliers and contractors in a bid to incorporate transparency in payment processes.**
- n) **The National Treasury, in concert with OAG&DOJ, should establish distinct codes of conduct and institutionalize professional cadres undertaking PFM engagements in the public service, particularly cadres such as: finance officers procurement officers, and accountants.**

3.9 The Office of the Auditor-General

3.9.1 Legal and Constitutional Status

The Office of the Auditor-General is established under Article 229 (6) of the Constitution of Kenya and is the Public Audit Act, 2003 which provides for the audit of Government, state corporations and local authorities. Article 229(6) of the Constitution requires the Auditor-General to confirm whether or not public money has been applied lawfully and in an effective way. This is a far-reaching responsibility that requires the Auditor-General to go beyond accounts certification and compliance to perform work that addresses the economy, efficiency and effectiveness with which public resources have been applied.

3.9.2 The Mandate

The core mandate of the Office of the Auditor-General is to carry out audits and report to Parliament and the relevant County Assemblies within statutory timelines. It includes carrying out economy, efficiency and effectiveness audits and audit of accounts of the national executive, county governments, the Judiciary and other independent tribunals, cities and urban areas, Parliament and the legislative assemblies (County Assemblies) in the county governments, statutory bodies/state corporations, commissions and other government agencies.

3.9.3 Observations of the Task Force

In respect of the Office of the Auditor General, the Task Force made the following observations:

- a) Limited financial resources to conduct audits.
- b) Shortage of human resources to undertake comprehensive and timely audits.
- c) Whereas the Office of the Auditor-General is an independent office under Article 248 of the Constitution, some provisions of the Public Audit Act, 2003 appear to compromise the operational independence of the Office vis-à-vis its relationship with the National Treasury. Secondly, the proposal in the Public Audit Bill, 2015, which assigns the Public Service Commission the responsibility to recruit the staff of the Office of the Auditor General, contravenes the provisions of Article 252(1) (c) of the Constitution of Kenya, which empowers every Constitutional commission or independent office the responsibility to recruit their own staff.
- d) Inadequate ICT capacity and capability, inadequate expertise to deal with emerging audits.

- e) The legal framework, which prohibits sharing of reports with other law enforcement agencies on a timely basis.
- f) It has not been possible for the National Assembly to consider most audit reports submitted by the Office of the Auditor-General for consideration and further recommendation within the stipulated timelines. This has hampered the implementations of the recommendations of the Auditor-General in a timely manner.

3.9.3 Recommendations of the Task Force

In order to strengthen the role of the Office of the Auditor-General in the fight against corruption, the Task Force recommends the following measures:

- a) **The Office of the Auditor-General, like other Independent Offices and constitutional commissions provided for under Chapter Fifteen of the Constitution of Kenya, should be granted the liberty and resources for the recruitment of its own staff, as per the provisions of Article 252(1)(c) of the Constitution.**
- b) **Enhance the budgetary allocation to the Office of the Auditor-General which will in turn help facilitate effective and efficient audit work.**
- c) **The Auditor-General should be given the leeway to share information with other law enforcement agencies, such as EACC, and the Directorate of Criminal Investigations (DCI), on corruption or criminal activities unearthed in the course of an audit processes.**
- d) **The Auditor-General should enhance the use of value-for-money audits on programmes and projects.**
- e) **The Auditor-General to give an opinion on whether or not the internal controls within MDAs are appropriate and sufficient to ensure that the systems support the accuracy of the financial systems and that fraud and corruption opportunities are minimized.**
- f) **In the conduct of a financial attest audit, public sector auditors should provide: an evaluation of the effectiveness of internal control over financial reporting against a suitable control framework; reporting against a suitable control framework; control over financial reporting; and an audit of internal control over financial reporting.**
- g) **Focus audit strategy more on areas and operations prone to fraud and corruption by developing effective high risk indicators for fraud.**

3.10 The Office of the Controller of Budget (OCB)

3.10.1 The Constitutional and Legal Framework

The Office of the Controller of Budget (OCB) is established under Article 228 of Constitution of Kenya, 2010. The Controller of Budget, just like the Auditor-General, is an independent office, and is a body corporate by virtue of Article 253 of the Constitution and Section of the Independent Offices (Appointment) Act, 2011⁵⁵. The powers of OCB, as independent office, and body corporate are set out under Section 3 of the Act. The Act also spells out the qualifications and procedure for the recruitment and appointment of the Controller of Budget.

⁵⁵Sec. 3, the Independent Offices (Appointment) Act, 2011 (No. 8 of 2011).

3.10.2 Mandate

The Controller of Budget oversees the implementation of budgets of the national and county governments by authorizing withdrawals from public funds after satisfying that such withdrawal, are authorized by law.

3.10.3 Observations of the Task Force

- a) No Act has been enacted to operationalize the operations of the office. The Independent Offices (Appointment) Act, 2011 only caters for the powers of independent offices (Auditor-General, and Controller of Budget) as body corporate and sets out the procedure for the recruitment of the holders of the two offices and other related matters.
- b) The Controller of Budget is required to submit reports on budget implementation to the Executive, Parliament and the County Assemblies. However, the Public Finance Management Act (PFMA) ⁵⁶does not provide the period within which the Reports should be debated by the Legislature and the timelines for the implementation of the recommendations.

3.10.4 Recommendations of the Task Force

In order to enhance the capacity and the role of the Controller of Budget to effectively discharge the responsibilities of the Office, whose work is very critical to prevention and combating of corruption, the Task Force recommends that:

- a) **The enactment of the Office of the Controller of Budget Act to streamline the operations of the Office should be fast-tracked.**
- b) **The Public Finance Management Act should be amended to provide for timelines for debate and action on the recommendations of the Controller of Budget.**

3.11 The Commission on Administrative Justice (CAJ)

3.11.1 Legal and Constitutional Status

The Commission on Administrative Justice (CAJ) (commonly referred to as, “Office of the Ombudsman”) is a constitutional commission established under Article 59(4) of the Constitution of Kenya, 2010 and the Commission on Administrative Justice Act, 2011 (No. 23 of 2011). It has the status and powers of a constitutional commission established under Chapter Fifteen of the Constitution and is a successor to the former Public Complaints Standing Committee (PCSC).⁵⁷

Article 59 (4) of the Constitution empowers Parliament to enact such legislation that may restructure the Kenya National Human Rights and Equality Commission (KNHREC) into two or more separate Commissions. Thus, following a policy decision to restructure the Kenya National Human Rights and Equality Commission, there are now three consequential constitutional commissions, namely: the Kenya National Commission on Human Rights (KNCHR), CAJ, and the National Gender and Equality Commission (NGEC).

⁵⁶ Public Finance Management Act, 2012 (Act No. 18 of 2012).

⁵⁷The Public Complaints Committee (PCSC) had been established by the President through Gazette Notice Number 5826 of 21st June 2007(vide the *Kenya Gazette* of 29th June, 2007), in exercise of his powers under Section 23(1) of the former Constitution. The rationale behind the creation of PCSC, which at the time was also referred to as “the Ombudsman”, was to address public complaints relating to maladministration, which did not fall under the ambit of the existing public institutions or law enforcement agencies.

3.11.2 Mandate

The mandate of CAJ is to inquire into cases of maladministration and promote good governance and efficient public service delivery by enforcing the right to fair administrative action as articulated under Article 47 of the Constitution. CAJ also investigates complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct perpetuated by public officers. CAJ would then make recommendations to a public entity for action.

As will be noted from the functions of the CAJ above, this is the only constitutional institution charged with the safeguarding of the rights of the private individual in the exercise of state power. It is, therefore, of critical importance that the CAJ is enabled to play this role in a meaningful manner by building its capacity and resourcing it sufficiently to enable it carry out this mandate in a robust manner.

3.11.3 Observations of the Task Force

The Task Force made the following observations regarding the powers, functions and the work of CAJ:

- a) CAJ lacks sufficient legal and institutional framework to adjudicate administrative disputes;
- b) CAJ lack compelling powers to give orders in matters of dispute resolution;
- c) CAJ suffers from inadequate financial and human capital to effectively execute its mandate;
- d) There is an apparent duplication of functions with other agencies especially EACC on matters of abuse of office;
- e) Public officers and institutions sometimes delay or fail to respond to inquiries made by CAJ;
- f) CAJ has limited presence in the counties;
- g) There is low public awareness of the mandate of CAJ;
- h) There are no adequate mechanisms for the enforcement of the decisions, determinations and recommendations of CAJ.

3.11.4 Recommendations of the Task Force

In order to enhance the critical role played by the Commission on Administrative Justice in the fight against corruption generally, and in the fight against maladministration in particular, the Task Force recommends the following:-

- (a) The Government should institute mechanisms in public institutions to deal with complaints from the public in a timely and effective manner.**
- (b) To fully decentralize the function of CAJ to all counties and government institutions as well as in the private sector.**
- (c) Establish public service delivery standards through deployment of service charters at both national and county level to ensure certainty of services offered to avert rent seeking in service delivery.**
- (d) Institutionalize administrative redress mechanisms as alternative dispute resolution mechanisms in fighting corruption.**
- (e) Create mechanism for integrated public complaints and referral mechanism at both national and county level.**

- (f) CAJ should create awareness about its mandate and functions.
- (g) The CAJ Act should be amended to provide for mechanisms for the enforcement of the decisions, recommendations, and directives of CAJ, and to provide for adequate legal mechanisms for adjudication over administrative complaints or disputes, and,
- (h) Enhance awareness and recognition of maladministration and inculcate a culture of prompt reporting of maladministration.

3.12 The National Anti-Corruption Campaign Steering Committee (NACCSC)

3.12.1 Legal and Constitutional Status

The National Anti-Corruption Campaign Steering Committee (NACCSC) was first established by the Government, vide Kenya Gazette Notice No. 4124 of 28th May, 2004 to complement the enforcement of laws that were enacted to fight corruption. It was one of the approaches to the war against corruption. NACCSC mandate was renewed in 2009, 2011 and 2014. From its inception until 2013, the NACCSC Secretariat was based at the then Ministry of Justice and Constitutional Affairs (MOJCA). Following the merger of the Ministry with the Office of the Attorney-General (OAG) to form the Office of the Attorney-General and Department of Justice (OAG&DOJ) in July, 2013, NACCSC is administratively placed under OAG&DOJ by virtue of *Executive Order* No. 2/2013.⁵⁸ The current batch of NACCSC members were appointed by the President on 19th September, 2014; vide Kenya Gazette Notice No. 6707 of the same date.⁵⁹ Consequently, the NACCSC Secretariat is responsible to the Solicitor-General (SG) as its Authorised Officer, and Accounting Officer.

NACCSC is a multi-sectoral Committee established by the Government to oversee the conduct of a mass anti-corruption awareness campaign throughout the country, with a view to creating a cultural renaissance that cherishes zero tolerance to corruption and insists on transparency and accountability in the management of public affairs. Its members are appointed for a term of five years (renewable). Membership is drawn from Religious Institutions – Muslims and Christians; Youth, Women and Persons With Disabilities (PWDs) organizations and relevant MDAs, including EACC.

The campaign is implemented through collaboration and partnership with these member institutions. The Chairperson, EACC is a member of NACCSC (this provides a vital linkage between the two agencies) and paragraph 5 (b) of the Kenya Gazette Notice No. 6707 obligates NACCSC to work closely with EACC. The diversity in the membership of NACCSC provides the committee with the necessary flexibility and a nationwide campaign machinery for the implementation of a mass movement against corruption in different situations that arise from time to time including rallying the public to openly express themselves on corruption e.g. demonstrations and strong statements against corruption. Other public institutions may not afford this type of flexibility necessary to give reason to the public to believe in and support the fight.

3.12.2 Structure of NACCSC

The creation of NACCSC was envisaged in Articles 5(1), 6(1 (b)) and 13(1) of UNCAC and mandate of OAG &DOJ. Notably, EACC, as the national dedicated agency to fight corruption in Kenya has an education mandate. On its part, NACCSC focuses on creating awareness in all segments of the public, except the public service which is the preserve of EACC in addition

⁵⁸Office of the President: *Organisation of the Government of the Republic of Kenya* (Executive Order No. 2/2013, May, 2013).

⁵⁹Article 132(4) (a) of the Constitution enables the President to, *inter alia*, "...establish an office in the public service in accordance with the recommendation of the Public Service Commission."

to its education mandate. In this regard, NACCSC shares campaign implementation reports with EACC, particularly those that disclose corruption cases, for further action. NACCSC also rallies support for the anti-corruption law enforcement agencies on reporting, recording statements and adducing of evidence in courts of law by members of the public. Each agency participates in activities organized for the public by the other, on invitation. The level of cooperation is at the policy-making levels of both EACC and NACCSC and is, therefore, effective.

3.12.3 Mandate of NACCSC

NACCSC is mandated to undertake a nationwide public education, sensitization and awareness creation campaign aimed at effecting fundamental changes in the attitudes, behaviour, practices and culture of Kenyans towards corruption. Establishment of the campaign, modelled on the campaign mounted against HIV/AIDS by the National Aids Control Council (NACC), was to diversify the approaches to the fight against corruption to include mobilization of the public in the fight and rally popular support particularly for the enforcement agencies. NACCSC implements the campaign through imparting deeper understanding of corruption, mobilization of the public to participate, rallying support for the anti-corruption agencies, values-based anti-corruption campaign and building partnerships and networks with Civil Society Organizations (CSOs) and Non-State Actors (NSAs) for an effective awareness campaign.

3.12.4 Observations of the Task Force

The Task Force noted the following:

- a) NACCSC is established under a Gazette Notice, instead of a statute and is, therefore, vulnerable since its existence depends on the Government of the day.
- b) Profiling and prioritization of public education, sensitization and awareness creation as one of the preferred approaches to fight and prevent corruption and rally support.
- c) The NACCSC receives inadequate financial and human resources to enable it fully implement an effective and sustainable anti-corruption campaign nationwide.
- d) There is a deeply entrenched culture of corruption across all sectors, significant levels of negative ethnicity and an apathetic public that is not involved in the fight against corruption, hence the need for a sustained anti-corruption awareness campaign.
- e) There exists inadequate anti-corruption support mechanism to enable the grassroots public fight corruption; hence awareness is not translated into action.
- f) The public has high expectations and wants instant results in anti-corruption.

3.12.5 Recommendations of the Task Force

- a) **NACCSC should be retained so that it can continue with a sustained sensitization, awareness creation against corruption, mobilizing and rallying public support for the fight against corruption, with a view to creating an anti-corruption culture in the country.**
- b) **Enhance the legal status of NACCSC by providing for its existence and mandate in a legal instrument by amending an existing legislation, such as the Leadership and Integrity Act, 2012 or any other relevant legislation.**
- c) **NACCSC should be facilitated to discharge its mandate through provision of adequate financial and human resources, and especially by filling existing vacancies in the Secretariat.**

- d) **The Government should provide adequate resources to build the capacity of NACCSC, strengthen the campaign including the values-based anti-corruption campaign and social audits on public projects and programmes. Thus, the existing vacancies of NACCSC should be filled to meet its full staff compliment.**
- e) **NACCSC establishes anti-corruption civilian oversight committees to undertake an aggressive behavioural change campaign, mobilize the involvement and participation by the public and provide support mechanism to the fight against corruption.**
- f) **The anti-corruption campaign strategy of NACCSC should be reviewed every five years, with a view to assessing the lessons learnt, so as to determine future reforms to the strategy and its implementation mechanism.**
- g) **EACC should provide formal anti-corruption education and training while NACCSC undertakes sensitization and awareness creation campaign against corruption for the general public. In case jurisdictional conflicts arise between the two institutions, the AG should arbitrate or advise appropriately.**

3.13 National Police Service (NPS)

3.13.1 Legal and Constitutional Status of the National Police Service

Prior to the promulgation of the Kenya Constitution in 2010, the Police Service in Kenya used to be referred to as the Kenya Police, established and governed under the then Police Act (Cap. 84 of the Laws of Kenya (now repealed)). The Force has had a long history of association with the fight against corruption in the country, which can be traced to the colonial period.

When Kenya enacted the first law specifically dedicated to anti-corruption in 1956, namely the Prevention of Corruption Ordinance, the legal instrument was being enforced by the Kenya Police. At independence, the Prevention of Corruption Ordinance became the Prevention of Corruption Act (Cap. 65) (now repealed) and was enforced by the Kenya Police up to 1997 when it was amended to create KACA as a special dedicated agency of government for dealing with corruption offences. Even after the disbandment of KACA in 2000, the fight was for a short time reposed in a special police unit known as the Anti-Corruption Police Unit (ACPU), which was somewhat independent but operated under the oversight of the Criminal Investigations Department (CID), the precursor to the Directorate of Criminal Investigations (DCI).

The National Police Service (NPS) is provided for and established under Article 243 of the Constitution, as one of the State organs on national security. It comprises the Kenya Police Service (KPS) and the Administration Police Service (APS).

3.13.2 Mandate

The objectives and functions of NPS are provided for in the Constitution, and reiterated in the National Police Service Act. It is noteworthy that Article 244(b) of the Constitution requires of NPS “to prevent corruption and promote and practice transparency and accountability”. There exists a difference of opinion as to whether this provision confers on NPS a parallel mandate to deal with corruption alongside the EACC or whether the provision relates to dealing with internal corruption in the Police Service which has been prevalent.

3.13.3 Observations by the Task Force

- a) By virtue of its role in law enforcement, NPS is a key stakeholder in the fight against corruption. According to *Global Standards to Combat Corruption in Police*

Forces/Services, “corruption undermines the effectiveness, the efficiency and legitimacy of police forces/services in the performance of their functions and erodes the public confidence in law enforcement and justice.”⁶⁰

- b) Despite the constitutional and statutory provision that mandates NPS to deal with corruption, the Service is yet to make any noticeable achievement on anti-corruption, be it internally or externally.
- c) NPS does not have any formation specifically dedicated to the fight against corruption.
- d) Corruption within NPS still remains prevalent, going by the National Corruption Perception Surveys, corruption cases lodged in the courts, and the outcome of the vetting of Police Officers being undertaken by the National Police Service Commission (NPSC).
- e) NPS has a close association with EACC especially in terms of staff. Most of EACC detectives are Police Officers seconded by the Public Service Commission. Additionally, the two agencies often conduct joint investigations on corruption matters and also mount joint operations in specific cases, among other collaborative initiatives.
- f) NPS provides security and escort services for EACC staff, as well as provision of security for EACC installations, offices and equipment. This is an important peripheral service crucial in the fight against corruption.
- g) The EACC has for a long time been operating without any police station specifically dedicated to the processing of corruption cases. However, in May, 2014, the EACC headquarters (Integrity Centre, Nairobi) was gazetted as a Police Station, and has been assigned a Crime Records (CR) Number and a Station Number. Consequently, EACC is able to process suspects pending their arraignment in court. However, this is not possible in the regions where EACC relies on Police Stations within the vicinity, owing to a general policy to the effect that only properties owned by public entities may be gazetted as Police Stations.
- h) The National Police Service has recently established an Internal Affairs Unit to deal with complaints against Police Officers, ranging from corruption and other malpractices. However, members of the public have not been well sensitized on the existence and operations of the Unit.
- i) When EACC forwards to the National Police Service cases of corruption for administrative handling, the NPS has been reluctant to provide feedback on the administrative measures taken against such officers.
- j) The Chief Justice (CJ) has recently issued guidelines on procedures and mechanisms for payment of court fines and bail on traffic offences. These guidelines are meant to address the problem of rampant corruption in the court bail processing system which has been the catalyst for corruption on the roads involving traffic police officers. The CJ's guidelines are a laudable initiative which may, if well-adopted and implemented, go a long way to reduce corruption among traffic police officers. However, members of the public have not been well-sensitized on the Guidelines.
- k) The idea of automatic processing of fines for road traffic offences at the point where the offence is committed has been mooted for a long time. However, the country is yet to come up with modalities of implementing it and ensuring adequate checks and balances to prevent incidents of corruption.

⁶⁰ Ronald K. Noble (Secretary General, Interpol), “Leading the fight against corruption” in *Global Standards to Combat Corruption in Police Forces/Services: the Fight against Corruption*, (Interpol: 2002) (www.interpol.int), at p. 1.

3.13.4 Recommendations of the Task Force

- a) NPS should, as a matter of priority, establish mechanisms to address the challenge of rampant corruption within the Police Force itself as well as in the country generally, to supplement the efforts by other agencies. This is constitutionally provided for under Article 244(b) of the Constitution. However, this provision appears to be focused on requiring NPS to develop internal mechanisms for preventing and combating corruption within the Service, as opposed to fighting corruption generally in the form and style of EACC.
- b) The Inspector-General of Police should gazette more EACC regional offices as police stations to facilitate quick processing of suspects on corruption cases in the regions.
- c) Owing to the numerous cases of corruption and other forms of malpractices by police officers, there should be a robust mechanism within the Service to administratively deal with them; with clear and timely feedback mechanisms to the institutions or individuals who refer such complaints.
- d) All agencies should be in the forefront of sensitizing members of the public on the application of the Chief Justice (CJ) Guidelines concerning processing of bail and court fines in traffic cases. The Judiciary must ensure that the Guidelines have been operationalized in all the court stations countrywide.
- e) The State should establish modalities and mechanisms to implement, with sufficient checks and balances, the automatic processing of fines on the road for traffic offences, including the alcohol limit and speed violations where corruption is rampant.
- f) Where an ordinary criminal offence is later determined as a corruption or economic crime, the matter should be handed to the EACC by the Police for finalization.
- g) NPS, in consultation with National Police Service Commission, (NPSC) should develop and maintain effective systems for the recruitment of Police officers of high levels of integrity, honesty, ethical standards and expertise and ensure that the systems for recruitment, posting, promotion and termination of police officers and other employees of the police forces/services are not arbitrary but are based on fairness, openness, ability and performance.
- h) NPS should adopt and domesticate the Interpol *Global Standards to Combat Corruption in Police Forces/Services*. The *Global Standards* contain best practices in combating corruption in Police forces/services, which Kenya could adopt for purposes of enhancing the role of NPS in fighting corruption within Service and in the country generally.⁶¹

3.14 Directorate of Criminal Investigations (DCI)

3.14.1 Legal and Constitutional Status of DCI

The National Police Service is established under Article 243 of the Constitution of Kenya, 2010. It consists of the Kenya Police Service (KPS) and the Administration Police Service and functions throughout Kenya. Section 28 of the National Police Service Act establishes the Directorate of Criminal Investigation (DCI) (formerly referred to as the Criminal

⁶¹Interpol: *Global Standards to Combat Corruption in Police Forces/Services: The Fight against Corruption*, (Interpol: 2002) (www.interpol.int).

Investigations Department (CID)), whose objective is to improve co-ordination and implementation of the DCI's mandate and increase efficiency and effectiveness in criminal investigations.

3.14.2 Mandate

DCI derives its mandate from Article 247 of the Constitution of Kenya and Section 28 of the National Police Service Act, 2011, which establishes the Directorate as an organ of the NPS responsible to the Inspector General (IG). The mandate of the Directorate is set out under Part V and more particularly under Section 28 and 35 of the National Police Service Act, which give the core mandate of the Directorate as: detection, prevention and investigation of crime.

3.14.3 Core Functions of the Directorate

The core functions of DCI as stipulated under Section 35 of the National Police Service Act, 2011 are as follows:-

- a) Collect and provide Criminal Intelligence;
- b) Undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and cyber-crime, among others;
- c) Maintain Law and Order;
- d) Detect and prevent crime;
- e) Apprehend Offenders;
- f) Maintain Criminal Records;
- g) Conduct forensic analysis;
- h) Execute the directions given to the Inspector General (IG) by the DPP pursuant to Article 157(4) of the Constitution of Kenya;
- i) Co-ordinate Country Interpol Affairs;
- j) Investigate any matter that may be referred to it by the Independent Police Oversight Authority (IPOA), and,
- k) Perform any other function conferred on it by any other written Law.

3.14.4 Areas of Collaboration:

DCI is ready and willing to co-operate with EACC over the investigation of corruption and economic crime. Thus, DCI may share its modern investigative technology to hasten the process of investigation for the EACC and other agencies, if so requested. Some of the potential areas of co-operation are:

a) Use of Intelligence-led Policing Strategy

The Intelligence-led Policing strategy will boost collection of criminal intelligence and improved detection, prevention and investigation of economic crimes, thus enabling the sharing of information.

b) Enhanced use of Forensics in Crime Management

The Directorate has started the construction of a Forensic Laboratory, which upon completion will consolidate many forensic requirements into a one stop destination for investigative agencies to share ideas. EACC would be welcome to use the facility.

c) Commissioning of Automated Palms and Fingerprints Identification System

The Directorate has commissioned the Automated Palms and Fingerprints Identification System (APFIS), which is aimed at facilitating the automation of finger-print analysis and management of the criminal data bank. This is expected to improve the delivery of justice and reduce the period taken to process the previous conviction records of an accused person from one week to 24 hours.

d) Procurement of Specialised Security Equipment

The Directorate has procured specialised security equipment for investigative units which include Cyber-Crime, Document Examination, Photographic, Crime Scene Support Services, and Criminal Intelligence Unit. The equipment is expected to enhance and quicken the investigative capacity of DCI and other leading agencies dealing with corruption and economical crime.

e) Creation of the Specialised Investigation Units

In response to emerging crime trends both locally and internationally, the DCI created the following specialised investigation units: Cyber-Crime Unit, International Crime Unit, Financial Investigation Unit, Capital Markets Fraud Unit, Insurance Fraud Unit, and Land Fraud Unit, which will supply and share any information of economical crime with EACC and other lead agencies.

3.14.5 Observations of the Task Force

- (a) The Directorate is understaffed.
- (b) Emerging serious crimes which are complex and sophisticated in nature consuming lots of resources, such as terrorism.
- (c) Inadequate funding by the Exchequer.
- (d) Lack of clear-cut policy by the Police on the fight against corruption.
- (e) Lack of automation and poor strategy on exchange of information.
- (f) Lack of forensic equipment and a laboratory (though there is one under construction).
- (g) The Economic Crime Unit of the Directorate does liaise with the EACC for the purpose of sharing information and learning new skills of detecting and tracking new trends of corruption and economic crime.
- (h) The DCI should at all times support the EACC in fight against corruption, when requested.
- (i) The DCI should continue to work effectively with other institutions and offices that play in the justice, law and order environment.
- (j) The DCI lacks adequate personnel with required specialized skills to use highly-specialized equipment which apply modern technology.
- (k) Lack of trust, transparency and accountability by the public.
- (l) Historical, attitudinal, perception and other soft or bad aspects of the Police Service which have made the Service suffer a bad reputation, accusation of non-professionalism, ineptitude and general perception of corruption.
- (m) Inadequate trained integrity Assurance Officers in the DCI.

3.14.6 Recommendations of the Task Force

- a) The DCI to assist the EACC with skilled and trained investigators to supplement and build capacity in the field of investigations**

- b) **The DCI to re-train its officers in corruption prevention strategy to curb emerging economic crimes which pose a great threat to the economy.**
- c) **The Directorate should enhance the operations of its Corruption Prevention Committee (CPC) which seeks to address the question of corrupt and unprofessional conduct by its officers and should have a clear and concise policy on the fight against corruption within and outside.**
- d) **Enhance the corruption prevention strategy within the Police/CID services within the National Police Service**
- e) **Enhance and mainstream implementation of corruption prevention policy under Ministry of Interior and MDAs, which will enable KPS, APS and CID monitor its errant officers in the field.**

3.15 National Intelligence Services (NIS)

3.15.1 Legal and Constitutional Status

The National Intelligence Service (NIS) is established under Article 242 of the Constitution.

3.15.2 Mandate

It is one of the national security organs established under Chapter 14 of the Constitution. The NIS is responsible for security intelligence and counter-intelligence operations to enhance national security.

3.15.3 Observations of the Task Force

Article 238 of the Constitution defines the term “national security” with all key pillars of social, political and economic stability. Corruption is a national security problem due to its potential to undermine the social, political and economic pillars of government, hence the need for the NIS to play an active role in the fight against corruption. The current situation is that there is periodic sharing of intelligence between the NIS and the EACC on areas of strategic interests and provision of technical and tactical support by NIS to EACC investigation teams.

3.15.4 Recommendations of the Task Force

In order to enhance the role of NIS in the fight against corruption, the Task Force recommends, *inter alia*:-

- a) **The development of strategies on faster sharing of information between existing security agencies.**
- b) **Where possible, real-time sharing of information between NIS and EACC and other law enforcement agencies, to ensure timely action against incidents of corruption.**
- c) **Sharing of information with EACC and the Independent Electoral and Boundaries Commission (IEBC) over persons seeking appointment or election to a State office respectively.**

3.16 Public Procurement Oversight Authority (PPOA)

3.16.1 Introduction

Public procurement accounts for over 70% of the National Gross Domestic Product (GDP). Through the various surveys on corruption conducted in the country, it has been established that almost 80% of all corruption cases in the country are procurement-related. Prior to 2005, procurement in the country was regulated by the National Treasury through periodical Circulars, issued by the Directorate of Public Procurement in the Ministry of Finance. The

Public Procurement Oversight Authority (PPOA) was established in 2005 in line with international best practices where it was felt that there was need for a national agency specifically dedicated to regulate an oversight public procurement.

3.16.2 Constitutional and Legal Framework

PPOA is established pursuant to the provisions of Section 8 of the Public Procurement and Disposal Act, 2005. Section 8 of the Act establishes PPOA as a body corporate responsible for the regulation and oversight of public procurement practice and disposal in Kenya. The objects of the current regime for public procurement of goods and services are: economy and efficiency; promotion of competition; integrity and fairness; transparency and accountability, and promotion of local industry and economic development.

The constitutional basis of oversight over public procurement and disposal of goods and services in the Public Sector is set out under Article 227 of the Constitution of Kenya, which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The Constitution provides that a statute shall be established to prescribe a framework within which policies relating to procurement and asset disposal shall be implemented.

3.16.3 Mandate, Functions and Powers

PPOA is responsible for the oversight, regulation and policy development of public procurement in Kenya. Even though the Procuring Entities (PEs) are responsible for managing and ensuring that the procurement process is in conformity with the legal and regulatory requirements, PPOA ensures that the PEs do indeed adhere to these requirements.

Thus, PPOA is specifically responsible for, *inter alia*:-

- a) Policy formulation and dissemination;
- b) Regulation of procurement practice and ensuring compliance with the legal and regulatory framework;
- c) Capacity building;
- d) Enforcing compliance with the Act and regulations through investigations and the ordering of corrective actions by the Administrative Review Board;
- e) Recommending to the Cabinet Secretary changes in procurement thresholds and authorities;
- f) Monitoring and Evaluation of the application of the Act and the Regulations;
- g) Recommending amendments to the Public Procurement and Disposal Act and to the Regulations, if, when and where necessary;
- h) Convening the annual consultative meetings on public procurement;
- i) Providing clarification, support and help to Procuring Entities in the carrying out of procurement procedures; and
- j) The maintenance of databases on procurement authorities and delegated authorities, procuring entities, procuring units, tender committee memberships and debarred bidders.

In terms of powers, PPOA has powers relating to: reviews/assessment; investigation; termination of procurement process/contract; transfer of procurement responsibility; enforce the decisions of the Review Board, and imposing sanctions against errant suppliers and

recommending administrative actions against officers who breach the law. PPOA has identified several causes of corruption in the procurement sector:-

- a) Lack of compliance with the law;
- b) Lack of transparency and accountability;
- c) Breakdown or erosion of values and norms;
- d) Weak management systems, procedures and practices;
- e) Lack of professional integrity;
- f) Greed;
- g) Abuse of discretionary power;
- h) Apathy/attitude; and
- i) Fraud triangle – Pressure; Opportunity, and Rationalisation.

3.16.4 Observations of the Task Force

The Task Force made the following observations with respect to the regulation and oversight of the public procurement in Kenya and the impact of corruption in the sector. PPOA has been facing a number of challenges in its bid to fight corruption in the procurement sector.

- a) Capacity constraints including inadequate funding/financing, weak staffing levels.
- b) PPOA lacks the legal power for discovery of documents from procuring entities when they are the subject of inquiry or investigation.
- c) There is a general lack of understanding of procurement law by the actors, including procuring entities service providers, investigative agencies and the courts.
- d) Unstructured co-ordination/linkages amongst anti-corruption and enforcement agencies.
- e) Poor records management, documentation and filing system.
- f) Lack of proper procurement planning and irregular implementation of procurement plans by public entities.
- g) Slow implementation of the e-procurement platform by public entities.
- h) Inadequate provisions in the law to address/cover some issues/areas, such as the acquisition or disposal of real property, and contract management, among other areas.
- i) The Public Procurement Administrative Review Board (PPARB) does not enjoy immunity from orders to pay court costs, thereby exposing it to a risk of financial paralysis owing to frequent awards of costs against the Board over some of the arbitral decisions it makes. Consequently, an immunity clause is recommended to protect the Board against such adverse such awards.
- j) Debarment provisions do not extend to company officers who are culpable of misdeeds; and,
- k) Some debarment grounds require that a person is first convicted of a criminal offence before they can be debarred.

3.16.5 Recommendations of the Task Force

In order to enhance the role of PPOA in the fight against corruption generally and the enhancement of integrity in the public procurement sector, the Task Force recommends, inter alia:-

- a) **Continuous development of the capacity (Procurement and Ethics) in personnel, procuring entities and suppliers and awareness creation and sensitization to the general public on public procurement.**
- b) **Enhance automation of procurement and payment processes (e-procurement). Sanction non-compliance with e-procurement processes.**
- c) **The PPOA, the PPOA Advisory Board, and the PPARB should be equipped with adequate financial, human and technical resources for purposes of enhancing the delivery of their services.**
- d) **There is need to give PPOA the power of discovery of documents.**
- e) **Strengthening the bid protest/review mechanism including provision of security bonds for procurement reviews and litigation at a per centage of the bid price.**
- f) **Streamlining the debarment guidelines.**
- g) **Incorporate a provision requiring the signing of an integrity code of conduct for business entities trading with public sector agencies as a precondition for eligibility to tender. Also make provision for the list of directors and beneficial owners of business entities trading in the public sector.**
- h) **Adoption and enforcement of deterrent sentences against suppliers or public officers convicted of procurement offences.**
- i) **The PPARB should be granted immunity from orders to pay court costs, which expose it to a risk of financial paralysis owing to frequent awards of costs against the Board over some of its arbitral decisions. Consequently, an immunity clause is recommended to address the problem in the following terms:**
 - In the performance of its functions, the Review Board shall enjoy quasi-judicial immunity and shall not be held liable for payment of costs in respect of decisions made by the Board in good faith and within its jurisdiction.**
- j) **PPOA to facilitate the continuous training and capacity building of procurement officers in public procurement law and regulations in addition to e-procurement training.**
- k) **Development of special code of conduct for procurement officers and tender committees incorporating passive corruption elements in procurement processes e.g. wilful neglect, unauthorized access to information, failure to report breach of process, etc.**
- l) **PPOA to publicize blacklisted companies and incorporate companies into blacklist found culpable of perpetuating public sector corruption.**
- m) **PPOA to audit and risk profiles on procurement in government agencies.**
- n) **PPOA to instil integrity training as part of procurement officer training.**

3.17 Public Service Commission

3.17.1 Constitutional and Legal Framework

The Public Service Commission (PSC) was established in 1954 by the colonial administrative following the Holmes Commission Report. The main function of PSC at the time was the administration of the human resource functions for the colonial administration under the Governor General on behalf of the Crown. After independence, PSC was reorganized and decentralized into eight Regional Commissions. These were abolished in 1966 and reverted

back to one Public Service Commission based in Nairobi. The situation has remained so to date.

Following the promulgation of the Constitution of Kenya, 2010, PSC was reconstituted in 2013 in line with the provisions of Article 233 of the Constitution and the Public Service Commission Act, 2012. It is composed of nine members including the Chairperson and Vice-Chairperson. PSC is supported by a Secretariat headed by the Commission Secretary who is also the Chief Executive Officer of the Commission.

3.17.2 Mandate

The mandate of PSC includes appointing persons to public offices, exercise of disciplinary control; ensuring that the Public Service is efficient and effective, developing human resource in the Public Service, promoting the values and principles in Article 10 and 232 of the Constitution; monitoring, investigating the organization, administration and personnel practices of the Public Service; advising and making recommendation to the national government on conditions of service, Code of Conduct and qualifications of public officers; undertaking evaluation and reporting on the extent to which the values in Article 10 and 232 are complied with throughout the Public Service; hearing of appeals from the County Public Service; recommending persons for appointments as Principal Secretaries (PSs) and hearing of petitions for the removal of the DPP and performing any other function conferred by national legislation.

Following the enactment of the Ethics and Anti-Corruption Commission (Amendment) Act, 2015, PSC is now empowered to recruit candidates for appointments as chairperson and members of EACC. The recruitment is done openly and any qualified person as per the provisions of the EACC Act may apply. The names of the qualified candidates are forwarded to the President for his consideration and onward transmission to the National Assembly for approval. Once the National Assembly vets and approves a candidate for appointment as a chairperson or member of EACC, the candidate is formally appointed by the President to the relevant position.

PSC is also vested with the responsibility of overseeing the enforcement of the Code of Conduct and Ethics and management of financial declarations of some categories of public officers under POEA. Thus, the Act requires PSC to administer Declarations of Income, Assets and Liabilities for the public officers under it on entering service, once every two years and when they exit service. The Act also requires PSC to promote ethical conduct of its officers through the issuance, dissemination and compliance enforcement of the Public Officer Code of Conduct and Ethics. In that regard, PSC has issued Administrative Procedures and Guidelines for the Declaration of Income, Assets and Liabilities in 2009⁶² and issued a Specific Code of Conduct and Ethics for Public Officers in May 2003.⁶³

3.17.3 Structure

PSC is structured into two tiers. The first tier constitutes the Commission chairperson, the vice-chairperson and seven members. The second tier is composed of the Commission secretariat headed by the Commission Secretary who is also the Chief Executive Officer. The work of the Secretariat is to support the Commission in the discharge of its mandate. The Secretariat is structured into five Directorates tasked with the various functions of the Commission.

⁶² L.N. No. 76 of 2009

⁶³ L.N. No. 123 of 2003.

3.17.4 Situational Analysis

The compliance levels with the legal requirements for the financial declarations (declaration of incomes assets and liabilities) provided for under POEA, have risen for the last ten years to about 95%. This indicates the willingness of the Public Officers to subject themselves to open scrutiny and transparency. The real benefit of the declaration of incomes assets and liabilities lie in the ability of the responsible Commissions to analyse the accuracy and completeness of records and make findings as to the integrity of the officers based on accountable disclosures. This has not happened due to the manual systems in use and the capacity of the Ethics Unit to handle the declarations numbering upwards of 300,000.

The mandate of PSC also includes the promotion of constitutional values and principles in Articles 10 and 232 of the Constitution. The national values and principles of governance enshrined in Article 10 include good governance, integrity, accountability and transparency. The values and principles of public service provided for under Article 232 of the Constitution include high standards of professional ethics, efficiency, effectiveness and economic use of resources, responsive, prompt, effective, impartial and equitable provision of public services, people participation in the process of policy making, transparent and timely provision of accurate information, accountability for administrative acts, fair competition and merit as the basis of appointments in the Public Service subject to representation of Kenya's diverse communities and the affording of adequate and equal opportunities for appointment, training and advancement at all levels of the Public Service of men and women, members of all ethnic groups and persons with disabilities. All these values and principles have a bearing on good public service governance, the fight against corruption and the accountable exercise of power and authority.

The Commission undertook the implementation of the constitutional values and principles through the undertaking of two baseline surveys on the State of the Public Service in 2012/2013 Financial Year (FY) and the 2013/2014 FY. The baseline information has informed the conceptual framework for the implementation of the values and principles which provides the road map for the discharge of this function of PSC.

The global governance indicators however reveal that Kenya is not doing well in most of the key fronts in the struggle towards improving good governance. On the economic front, the *Global Ease of Doing Business Report 2014* places Kenya at position 136 out of 189 countries and the *Global Competitiveness Report* for 2014 places Kenya at position 115 out of 144 countries assessed. The *Global Corruption Perception Survey Index* for the 2014 places Kenya at position 145 out of 174 countries assessed which also shows that Kenya is being ranked among the countries considered most corrupt and failed states.

The end result of good governance is the improvement in the quality of lives of the people which is assessed through the *Global Human Development Index* which placed Kenya at position 147 out of 195 countries assessed. All these indicators cannot be wrong. Corruption in Kenya has reached such pervasive levels that it has begun to threaten the very existence of the state through possible collapse of key state institutions including Parliament (National Assembly), watchdog institutions and law enforcement agencies, some key institutions in the Executive arm of the Government and some county government institutions.

PSC has a critical role in ensuring that the good governance standards are promoted and upheld in the public service. It must be agreed that it is not possible to conceive, design and execute grand corruption schemes without the connivance of public officers at all levels of the Public Service. The chain of conspiracy and the abetting of acts of corruption through the silence of the rank and file in the Service need to be broken. This cannot be done unless confidence is built within the Service that those who resist corruption or report and give evidence against the perpetrators of corruption are sufficiently insulated against a backlash

from those they expose and give evidence against. This requires legal and institutional reforms and political and administrative goodwill at the highest levels of government. This means that the protection of public officers provided for under Article 236 of the Constitution⁶⁴ should be backed up with necessary legal, policy and administrative framework for supporting public officers who stand up to corruption.

3.17.5 Challenges faced on the fight against corruption

The Task Force noted that PSC faces a number of challenges in its work:-

- a) Outdated legislative and policy framework;
- b) High scope of responsibility – there are over 260 Ministries, Departments and Agencies (MDAs) with over 300,000 officers under the jurisdiction of PSC on the functions of promotion, evaluation, and reporting on constitutional values and principles the Public Service and the administration of POEA;
- c) The manual nature of the declarations of income, assets and liabilities does not make it easy to analyse and render advisory opinions to other stakeholders the integrity of the declarations and to the officers on areas of concern;
- d) The many institutions dealing with the fight against corruption creates conflict of roles and affects budgetary allocations;
- e) The slow passage of policies, legislations and administrative procedures meant to give effect to the constitutional provisions on the promotion of integrity in the public service;
- f) The multiplicity of institutions with similar mandates which sometimes work at cross-purposes or get in each other's way;
- g) Lack of an integrated personnel data-base;
- h) Slow uptake of technology; and
- i) Weak infrastructural framework to support diversity management and affirmative.

3.17.6 Key policy issues

The Task Force noted the following Policy issues from the work of PSC:-

- a) Weak compliance enforcement of ethical standards.
- b) Unclear reporting linkages and obligations.
- c) Weak regimes of witness and whistle blower protection.
- d) Conflict of roles due to multiplicity of institutions fighting corruption.
- e) Budgetary constraints.
- f) Slow passage of legal and policy documents.
- g) Long delays in finalizing corruption cases in court.
- h) Ineffective procedures for vetting of persons for appointments into public office.
- i) Slow processing of disciplinary cases.

⁶⁴Article 236 of the Constitution provides that, "A public officer shall not be – (a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or, (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law."

- j) Weak management accountability framework.
- k) Lack of an integrated risk management framework.
- l) Lack of a shared integrity curriculum in the training and sensitisation of public officers.

3.17.7 Recommendations of the Task Force

In order for PSC to contribute to the fight against corruption generally and the promotion of ethics and integrity among the public officers it is responsible for, the Task Force recommends the following measures:-

- a) **Put in place efficient and effective measures to prevent and combat corruption and unethical practices among public officers generally and civil servants in particular including an immediate audit of all deployments to ministries of all general cadre officers who have stayed in their stations for longer than the designated periods. Immediate redeployments to be undertaken.**
- b) **Review the enforcement of the Code of Regulations, and the PSC Code of Conduct and Ethics, as provided for under POEA.**
- c) **Impose regulations to the effect that public officers cannot have unsecured debts and liabilities more than three times their monthly salary;**
- d) **Incorporate ethics and integrity indicators as part of recruitment, performance appraisal, promotion processes as against public complaints received against officers.**
- e) **Institute efficient and effective measures to enhance awareness on anti – corruption and best ethical practices at all levels of the Public Sector.**
- f) **In appreciating that the ethics and integrity efforts in the Public Service may lead to a state of trepidation and disenchantment that erodes the collective spirit, the PSC should prioritize the simultaneous recognition and support for exemplary public service among officers, ensuring that an enabling environment that recognizes effort, hard work and dedication are not only appreciated but extolled.**
- g) **Review and develop efficient and effective systems and structures for the efficient and effective administration of POEA.**
- h) **Develop a secure on-line system for filing, management, access, and verification of financial declarations (Declarations of Income, Assets and Liabilities) of public officers the PSC is responsible for.**
- i) **Provide access to the information contained in the financial declarations of a State officer or public officer who may be under investigation by EACC or any other law enforcement authority.**
- j) **Enhance access to financial declarations of public officers upon request by any person and in accordance with the provisions of Section 30 of POEA, and the Public Officer Ethics (Management, Verification, and Access to Financial Declarations) Regulations, 2011.⁶⁵**
- k) **Develop and implement an efficient and effective country-level monitoring, evaluation and reporting framework.**

⁶⁵ Legal Notice No. 179 of 25th November, 2011.

- l) Institute country-level management and accountability framework.**
- m) Institute a service-wide level management accountability framework.**
- n) Institute service-wide Citizen Service Delivery Charter, and,**
- o) Institute service-wide annual governance audits.**

3.18 Assets Recovery Agency (ARA)

3.18.1 Legal Framework for the ARA

The Asset Recovery Agency is established under Section 54 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) as a body corporate and as a semi-autonomous body under the Office of the Attorney-General. The AG has appointed an interim Director to the agency and is currently using seconded staff from OAG&DOJ. The AG has set up a Task Force comprising regulatory and law enforcement agencies to fully operationalize the ARA and draft operational guidelines.

3.18.2 Mandate

The key function of the Agency is to trace, freeze and confiscate proceeds of all crime, as per the provisions of POCAMLA.

3.18.3 Observations of the Task Force

Currently, the ARA has an interim Director based at OAG&DOJ. There is insufficient number of staff seconded to the Agency despite its establishment several years ago, yet its mandate is very crucial in the fight against corruption. The mandate of the ARA overlaps with the asset recovery powers conferred on the EACC.

3.18.4 Recommendations of the Task Force

- a) ARA should be fully operationalized as a matter of priority including requisite capacity building of staff, law enforcement agencies and the public on POCAMLA.**
- b) Amend section 111 to provide for the use of the Criminal Assets Recovery Fund by the Agency in furtherance of fighting crimes under the Act.**
- c) Amend section 112 of POCAMLA to allow all proceeds from confiscated assets to be paid into the Criminal Asset Recovery Fund.**
- d) Development of regulations under POCAMLA to facilitate effective implementation of the Act.**
- e) Develop a national register of confiscated properties.**
- f) ARA should adopt international best practices in asset recovery by benchmarking with the asset recovery strategies of countries such as: China; Italy; Botswana; Romania, and Mauritius.**

3.19 The Financial Reporting Centre (FRC)

3.19.1 The Legal and Constitutional Framework of the Financial Reporting Centre

The Financial Reporting Centre (FRC) is Kenya's Financial Intelligence Unit (FIU). The FRC is established under section 21 of POCAMLA as an independent body whose principal objective is to receive, analyze and disseminate information on suspicious transactions and other reports and to make information collected by it available to investigative and other authorities to facilitate the administration and enforcement of the laws of Kenya.

3.19.2 Mandate

FRC has extensive functions and powers which include, amongst others;-

- (a) receipt and analysis of :
 - (i). reports of unusual or suspicious transactions submitted by reporting institutions;
 - (ii). cash transaction made by reporting institutions as well as
 - (iii). Cash declaration forms received from border points.
- (b) Disseminating of reports received to appropriate law enforcement authorities or other supervisory bodies for further handling;
- (c) Make information collected by it available to investigative and other authorities to facilitate the administration and enforcement of the laws of Kenya.
- (d) Undertaking inspection and supervision of Reporting Institutions to ensure compliance with AML/CFT reporting obligations as prescribed in POCAMLA.
- (e) Facilitating exchange of information on money laundering activities with other financial intelligence units in other countries.
- (f) Developing AML/CFT Regulations to provide guidance to support implementation of the Act.
- (g) Developing AML/CFT training programs for Reporting Institutions.

3.19.3 Observations of the Task Force

Regarding the work of FRC, the Task Force made the following FRC observations:-

- a) Most governments databases are not digitized hence FRC has to do manual searches on various entities and individuals suspected of corruption whose proceeds result to money laundering, which is time-consuming.
- b) There is a general lack of awareness on money laundering knowledge among agencies.
- c) Poor co-operation and co-ordination between agencies.

3.19.4 Recommendations of the Task Force

In order to strengthen the role of FRC in the fight against corruption generally and in the fight against money laundering in particular, the Task Force recommends the following measures:-

- (a) Capacity-building and additional resources to FRC on investigating financial and economic crimes.**
- (b) Recruitment of additional staff.**
- (c) Provide feedback to reporting agencies on action taken on suspicious transaction reports received and enhance continuous engagement, training and sensitization for reporting agencies and the general public.**
- (d) Timely or real-time sharing of information(dissemination) with EACC, ARA, and DCI on matters touching on corruption.**
- (e) Assisting in the tracing of financial flows related to corruption;**
- (f) Liaising with sister agencies outside the country on sharing of information for purposes of facilitating corruption investigations.**

(g) FRC, ARA, DCI and EACC are encouraged to hold regular inter-agency meetings to discuss issues of mutual interest in the fight against corruption and economic crime.

(h) There is need to train various agencies mandated with fighting corruption and economic crime on anti-money laundering generally and the nexus between money laundering and the proceeds of corruption, terrorist financing and economic crime.

3.20 Witness Protection Agency (WPA)

3.20.1 Legal and Constitutional Framework

The Witness Protection Agency (WPA) was established in August 2011 in accordance with the provisions of the Witness Protection Act, 2006 as amended by Witness Protection (Amendment) Act, 2010. The objective of the Act is to provide a framework and procedures for giving special protection to threatened and intimidated witnesses.

3.20.2 Mandate

WPA is an independent and autonomous body, whose mandate is the protection of threatened and intimidated witnesses to ensure successful identification, apprehension, investigation and prosecution of perpetrators of crimes.

3.20.3 Observations of the Task Force

Witnesses are critical agents in any criminal justice system as they facilitate successful identification, apprehension, gathering of evidence and prosecution of criminal offenders and determination of criminal offences. The enactment of the Witness Protection Act, 2006 (as amended in 2010) demonstrates an important commitment by the state towards tightening the criminal justice system in the country and presents hope for threatened witnesses in crimes.

The implementation of the Witness Protection Act is facing the following challenges:

- a) The delay in conclusion of criminal and economic offences due to fear and reluctance of threatened, intimidated and vulnerable witnesses to testify.
- b) The delay in conclusion of cases occasioned financial burden to the Government and fatigue from some of the witnesses tired of waiting for completion of their cases.
- c) Inadequate resources to cater for threatened, intimidated and vulnerable witnesses.
- d) Inadequate capacity to run the specialized Witness Protection Service.
- e) Inadequate personnel specialized in witness protection involving in corruption related matters.
- f) Inadequate awareness on witness protection operations by criminal justice chain stakeholders.

3.20.4 Recommendations of the Task Force

The Task Force recommends the following;

- a) **Enhancing inter-agency coordination between EACC, WPA and NPS to ensure the safety of threatened witnesses engaged in cases of grand corruption.**
- b) **Amendments to the WPA Act to make provision of security and incentives to whistleblowers.**
- c) **Sensitization and training of stakeholders on the mandate and role of WPA.**
- d) **Conclusion of a memorandum of understanding (MOU) between the EACC and the WPA on the safety and security of whistleblowers and vulnerable witnesses.**

- e) **Provision of adequate financial resources and human resource capacity to enable WPA effectively implement its statutory mandate.**

3.21 Independent Electoral and Boundaries Commission (IEBC)

3.21.1 Legal and Constitutional Framework

IEBC is established under Article 88 of the Constitution of Kenya, 2010. Details on the composition, powers, mandate and functions of IEBC are set out in the Independent Electoral and Boundaries Commission Act, 2011.⁶⁶

3.21.2 Mandate

IEBC is generally responsible for conducting or supervising referendums and election to any elective body or office established under the Constitution and any other election as prescribed by an Act of Parliament, and in particular, for:-

- a) Continuous registration of citizen as voters.
- b) Regular revision of the voters roll.
- c) The delimitation of constituencies and wards.
- d) Regulation of the process by which parties nominate candidates for election.
- e) Settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of election results.
- f) Registration of candidates.
- g) Voter education for elections.
- h) Facilitation of the observation, monitoring and evaluation of elections.
- i) Regulation of the amount of money to be spent by or on behalf of a candidate or party in respect of any election.
- j) Development of a Code of Conduct for candidates and parties contesting elections, and,
- k) Monitoring of compliance with legislation required by Article 82(1) (b) of the Constitution relating to nomination of candidates by parties.

3.21.3 Observations of the Task Force

With regard to the work of IEBC, the Task Force made the following observations:-

- a) Insufficient resource allocation to the Commission.
- b) Lack of proper co-ordination with other agencies.
- c) Challenges in monitoring observance of the Elections Code of Conduct by candidates and Political Parties.
- d) Lack of sufficient mechanisms for monitoring sources and amount of money spent by a candidate or a party in an election.

3.21.4 Recommendations of the Task Force

In order to enhance the role of IEBC in the fight against corruption generally and enforcement of the ethics and integrity principles in the vetting of persons seeking

⁶⁶ See generally: The Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011).

election or nomination to a State office at the national or county levels of Government, the Task Force recommends the following measures:-

- a) **There is need to allocate adequate funds to enable IEBC operate efficiently.**
- b) **Strengthen legal framework under which the IEBC and EACC operate for purposes of enforcing principles of ethics and integrity among persons seeking nomination or election.**
- c) **Initiate development of an objective and effective criteria and mechanism for vetting of ethics and integrity tenets for electoral candidates and persons seeking appointment to a State office or public office in the national or county government.**
- d) **Development of regulations to provide for administrative consequences (e.g. withdrawal of committee membership benefits) for elected officials under investigation and prosecution on corruption and economic crime related offences.**
- e) **IEBC should ensure strict adherence to the provisions of the Elections Act, 2011⁶⁷, and the Election Campaign Financing Act, 2013⁶⁸, and where necessary seek the intervention of EACC, ODPP or the National Police Service, or the Judiciary, for purposes of ensuring ethics, integrity and transparency in the conduct of elections or referendums not only for the election officials but also for candidates (including independent candidates) and political parties participating in such elections or referendums.**

3.22 Inspectorate of State Corporations

3.22.1 Constitutional and Legal Framework

The Inspectorate of State Corporations (ISC) is established under the State Corporations Act.⁶⁹ Its mandate is to advise the Government on all matters affecting the effective running of state corporations. ISC is an important government advisory and supervisory agency. The overall goal of ISC is to assist the government to improve performance, profits and generation of overall resources of SOEs (State Organizations Enterprises) through regular appraising, evaluating and monitoring the performance of SOEs in light of their mandates specified in the relevant legal instruments under which they were constituted. The Inspector of State Corporations is, therefore, expected to ensure that State Corporations are managed in accordance with sound management principles that reflect accountability and transparency.

3.22.2 Mandate

The mandate and core functions of ISC as spelt out in the State Corporations Act and further expanded through Legal Notice No. 93 of 2004, which introduced Performance Contracting in State Corporations, are to:-

- a) Advise the Government on all matters affecting the effective running of state corporations;
- b) Report periodically to the relevant arms of Government on management practices within any state corporation;
- c) Report to the Auditor-General any cases where moneys appropriated by Parliament are not being applied by state corporations for the purposes for which they were appropriated;

⁶⁷ See: The Elections Act (Cap. 7 of the Laws of Kenya).

⁶⁸ The Election Campaign Financing Act, 2013 (Act No. 42 of 2013).

⁶⁹ Cap 446 of the Laws of Kenya.

- d) Conduct special investigations of any state corporation on behalf of the State Corporations Advisory Committee (SCAC) and the Auditor-General;
- e) Undertake surcharge action against any person who incurs or authorizes irregular expenditure of state corporation funds or any person who through negligence or misconduct causes loss of funds to the state corporation.
- f) Evaluating actual results of operations and management by state corporations on the basis of the agreed performance targets;
- g) Determining methods for evaluating performance in state corporations on the basis of specified and agreed targets;
- h) Developing performance evaluation criteria; and
- i) Advising on the administration of performance contracts.

3.22.3 Challenges faced

ISC has faced a number of challenges in its work. Some of the challenges faced are that: it suffers from limited financial and human resources to undertake its mandate; delay in the consideration of the ISC report by the relevant Parliamentary Committee, and lack of inter-agency co-operation with other agencies like EACC, KENAO, and PPOA in fighting corruption.

3.22.4 Observations of the Task Force

The Task Force made the following observations regarding the work of ISC:-

- (a) There is weak inter-agency co-operation between the Inspectorate of State Corporations and other agencies responsible for fighting corruption in the Public Sector, such as EACC, KENAO, and PPOA.
- (b) There Inspectorate of State Corporations lacks adequate financial and human resources for the implementation of its mandate, and,
- (c) There is no effective legal framework for enforcing the recommendations of ISC made pursuant to the conduct of an audit in a State corporation.

3.22.5 Recommendations of the Task Force

To enhance the role of ISC in the fight against corruption generally and in the promotion of ethics and integrity among state corporations and the management of such corporations, the Task Force recommends the following measures:-

- a) **Deploy ISC to assess the propriety of the use of public resources by state corporations.**
- b) **There is need to enhance inter-agency co-operation, and sharing of information, between ISC, EACC, KENAO, and relevant watchdog Committees of Parliament over the utilization of public resources in state corporations.**
- c) **Review the operational protocols, objects and purpose of Inspector of State Corporation's functions in state corporations.**
- d) **Deploy staff as compliance officers (Inspectorate or SCAC staff) to state corporations to report on compliance with *Mwongozo*⁷⁰ to ISC or SCAC.**
- e) **Undertaking Efficiency Monitoring objectives within state corporations.**

⁷⁰ Republic of Kenya, *Mwongozo: The Code of Governance for State Corporations* (Nairobi: Public Service Commission & State Corporations Advisory Council (SCAC), January, 2015).

3.23 Efficiency Monitoring Unit

3.23.1 Overview of EMU

The Efficiency Monitoring Unit (EMU) was established in 1991 through a Presidential Executive Order to oversee prudence in the use and management of Government resources including those of development partners. It was the oversight agency that worked closely with the then CID Department to fight corruption. The Police Department focused on prosecution while EMU concentrated on gathering of evidence through analysis of financial and cost management records. Before the promulgation of the current Constitution, authority was central within the Presidency and the responsibility on performance rested with Office of the President. EMU was an indispensable tool in the hands of the President in investigating, auditing and preparing evidence-based reports to support decision-making.

Since the promulgation of the Constitution in 2010 and the establishment of EACC, oversight authorities are now answerable to Parliament and the President. As a result, the legal mandate to fight corruption is vested in EACC or other constitutional bodies. Nonetheless, the Presidency is still inundated with complaints over corruption in various public offices. This explains why the role of EMU remains central as a direct oversight agency for the Presidency, as the first line of action for the Presidency to assess allegations of impropriety in public institutions or to assess the efficiency of some public bodies.

Generally, the EMU mandate and functions have remained unchanged over the years except the rephrasing of the same. They are unique and distinct from other agencies in that focus is on efficient and effective service-delivery in utilization of public resources and good corporate governance. Internal Audit's work entails giving the management an assurance that money is being put to the intended purpose. In the Public Service, the Central Planning and Project Monitoring Unit (CPPMU) carries out policy analysis and monitors the implementation of Government projects to support respective Ministries. On the other hand, the Kenya National Audit of Office (KENAO) (formally known as the Office of the Auditor General) conducts financial audits for all government agencies and reports directly to the National Assembly. On its part, EACC carries out forensic audits in reported cases of corruption as an independent constitutional Commission.

EMU has remained an oversight agency reporting to the Executive, on the extent to which MDAs are carrying out their mandate in an efficient and effective manner. It has particularly been a rapid response team on the hands of the Executive when issues of governance, efficiency and effectiveness in MDAs have arisen. EMU is the only oversight agency that is directly answerable to the Executive and available for instant deployment to support decision-making, particularly for the Presidency. However, EACC and other oversight agencies retain their core mandates to ensure that good governance is institutionalized in MDAs through advocacy, capacity-building, regular audits, forensic audits and investigations.

3.23.2 Legal Status of EMU

EMU justifies its existence through a patchwork of constitutional and statutory provisions relating to the functions of other offices and requiring transparency and accountability. EMU's legal status is derived from the functions of the Presidency as set out under the Constitution, particularly under Article 131(1)(a) and (b), 132(3)(b), 232(1)(b), 249(2)(a)&(b) 254(1) and (2).

3.23.3 Mandate

To oversee prudence in the use and management of Government resources including those of development partners.

3.23.4 Functions

The functions of EMU have been refined to include the following:-

- a) Promote good governance, integrity and transparency and accountability in the Public Service;
- b) Undertaking research and advocacy to promote good corporate governance in National and County governments;
- c) Monitoring implementation of Government policies;
- d) Monitoring compliance to constitutional reporting requirements by constitutional commissions and independent offices;
- e) Undertaking value for money and management audits;
- f) Ascertain authenticity of reported or alleged mismanagement, misappropriation, misuse, abuse and/or wastage of public resources;
- g) Assess efficiency and effectiveness in management systems and implementation of programmes/projects in National and County Governments; and,
- h) Assess and promote County Governments' capacity for monitoring efficiency and effectiveness in the utilization of public resources.

3.23.5 Challenges faced

EMU has been facing a number of challenges in the execution of its mandate, such as:-

- a) *Lack of clear and specific legal provisions for its mandate:* EMU is an oversight agency in the Executive arm of the Government set up to provide early warning on governance issues, efficiency and effectiveness in utilization of public funds. However, since it is not established under any formal legal framework, in the course of its work, it faces some legal challenges over the legal status of its investigations and other activities;
- b) *Risks associated with investigative assignments:* Oversight work carries great risks and high level of litigation issues. Risk and legal issues management is therefore necessary;
- c) *Enforcing Compliance:* The Unit makes recommendations and a follow-up on implementation of recommendations made. However this is usually advisory. For compliance especially where gross misconduct is involved, there is need for some legal framework for the enforcement of the recommendations of the Unit;
- d) *Legal Issues:* Occasionally, queries are raised by persons or institutions implicated in investigations carried out by over the legal status of EMU;
- e) *Inadequate operational staff:* EMU is dependent on staff experienced in the Public Service operations. Attracting and retaining staff in the Unit has been a challenge. Capacity to train and engage the staff in their duties is necessary; and
- f) *Inadequate funding:* In the recent past, budget constraints have hampered the operations of the Unit. While this is not unique to the Unit, it requires to be addressed in order to provide adequate capacity for the Unit to accomplish its mandate.

3.23.6 Observations of the Task Force

Following an assessment of the work of EMU, the Task Force makes the following recommendations:-

- a) EMU is an Executive-based Unit within the Presidency aimed at ensuring that public institutions perform their functions with the necessary efficiency, effectiveness, transparency and accountability.
- b) EMU is a key actor in the implementation of Executive Order No. 6 on *Ethics and Integrity in the Public Service*⁷¹ a view to ensuring that all public officers, Ministries, Departments and Agencies (MDAs) comply with the necessary ethics and integrity standards of the Public Service and quick enforcement action is taken against any public officer or public institution that tolerates or fosters corruption.
- c) Although there appears to be an apparent duplication of mandates among state actors involved in the fight against corruption and auditing of misappropriation of public funds, especially between EMU and the Office of the Auditor General, there is a difference between the roles of the two public entities. The Auditor General reports to Parliament and is an Independent Office. The key focus of the Office of the Auditor General is financial audits and value for money audits. Normally, issues of efficiency and effectiveness are normally not an integral part of the work of the Auditor General, and,
- d) EMU can play a critical role towards securing the implementation of annual or other regular reports prepared by watchdog and law enforcement bodies, such as EACC, and the Auditor General, among other public entities, which the Presidency is required to consider under Article 254 of the Constitution and other various statutory instruments.

3.23.7 Recommendations of the Task Force

To enhance the role of EMU in the fight against corruption generally and particularly in the conduct of efficiency audits and the monitoring of the implementation of Executive Order No. 6 (*Ethics and Integrity in the Public Service*), among other Executive Orders, the Task Force recommends that:-

- (a) **Without compromising the mandate or roles of any constitutional commission or independent office, EMU should play an oversight role, with responsibility to file reports with the Presidency, to provide preventive oversight services over the performance of public bodies to ensure efficiency and effectiveness;**
- (b) **EMU could be assigned the role of undertaking reports analysis, value for money audits, austerity checks in the Ministries, Departments and Agencies (MDAs), and evaluation of reports from Independent Offices and henceforth report to the Presidency;**
- (c) **EMU could be assigned the role of analysing the reports of EACC, the Auditor General, the Controller of Budget, and other Constitutional Commissions, as per Article 254 of the Constitution, with a view to ensuring that the reports are complied with, and preparing summary reports to facilitate informed decision-making by the Presidency; and,**
- (d) **The Public Service Commission (PSC) may consider delegating some of its functions under Article 234 of the Constitution to EMU for purposes of ensuring the enforcement of this provision of the Constitution.⁷²**

⁷¹Republic of Kenya: *Ethics and Integrity in the Public Service* (Executive Order No. 6 of 6th March, 2015): The Office of the President, Nairobi, 2015).

⁷²Article 234(2) (c) of the Constitution confers on PSC the power to promote the values and principles referred to in Articles 10 and 232 throughout the Public Service. Further, Article 234(5) allows PSC to delegate in writing with or without conditions any of its functions and powers. In view of the above and based on its mandate and

CHAPTER FOUR: STRATEGIES FOR ENHANCING THE FIGHT AGAINST CORRUPTION

4.1 Introduction

This Chapter addresses Terms of Reference (TORs) 3(b), and 3(h) of the Gazette Notice. Paragraph 3(b) required the Task Force to “*propose appropriate reforms to legal, policy and institutional framework for fighting corruption and promoting ethics and integrity*”. Further, Paragraph 3(h) had required the Task Force to “*consider and propose appropriate institutional arrangements for training and capacity-building on anti-corruption, ethics and integrity for key anti-corruption agencies and other public officers generally.*”

In making the proposals made in this Chapter, the Task Force reviewed the relevant literature, such as: - the Constitution of Kenya, 2010, the *Draft National Ethics and Anti-Corruption Policy*⁷³, relevant statutes, international and regional anti-corruption instruments such as UNCAC,⁷⁴ and AUCPCC.⁷⁵ In addition, the Task Force considered the *Draft UNCAC Country Review Report of Kenya*⁷⁶ relating to the implementation of Chapter III (Criminalisation and Law Enforcement), and Chapter IV (International Co-operation) of UNCAC.

Inference has also been drawn from memorandums received by the Task Force from different (public and private sector) organizations highlighting current and previous experiences, best practices, successes and challenges faced in the fight against corruption in Kenya and other jurisdictions. The proposals highlighted in this Chapter cover ten broad strategic areas namely:-prevention; education, training and public awareness; criminalisation; investigations; prosecution; adjudication; asset recovery; international co-operation; social accountability and *qui tam* actions, and leadership and integrity.

4.2 Prevention

4.2.1 Framework for Corruption Prevention

Prevention entails nipping corruption in the bud. It is a process of detecting, examining and identifying corruption loopholes and opportunities and putting in place measures to minimize those opportunities and seal the loopholes. This involves putting in place appropriate checks and balances within public institutions to ensure that the identified corruption loopholes are sealed.

In Kenya, the legal framework for the implementation of the prevention strategy is predicated upon Section 11 of the EACC Act⁷⁷. It empowers EACC to undertake corruption prevention work in relation to State officers, through various measures, such as to: develop and promote standards and best practices in integrity and anti-corruption⁷⁸; develop a code of ethics⁷⁹; work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;⁸⁰ and, subject to Article 31 of the Constitution (on privacy), monitor the practices and procedures of public bodies to detect corrupt practices and

experience, EMU may, with the concurrence of PSC, be tasked to undertake the tasks on behalf of PSC to ensure effectively and timely implementation of this provision of the Constitution.

⁷³ Office of the Attorney-General and Department of Justice, *Draft National Ethics and Anti-Corruption Policy*, (Nairobi: April, 2015).

⁷⁴ United Nations Convention Against Corruption, (United Nations, New York, 2004).

⁷⁵ African Union Convention on Preventing and Combating Corruption, 2003.

⁷⁶ United Nations Office on Drugs and Crime, *Draft Country Review Report of Kenya* (Vienna, April, 2015).

⁷⁷ Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)

⁷⁸ *Ibid*, Section 11(1) (a) (i).

⁷⁹ *Ibid*, Section 11(1) (a) (ii).

⁸⁰ *Ibid*, Section 11(1) (b).

to secure the revision of methods of work or procedures that may be conducive to corrupt practices.⁸¹

It is also noteworthy that Section 13(2) (b) of the EACC Act grants EACC the power to, among other things, “undertake preventive measures against unethical practices and corrupt practices.” This power (under Section 13(2)(b), as complemented by EACC’s function under Section 11(1)(j) of the Act to “... secure the revision of methods of work or procedures that may be conducive to corrupt practices” implies that EACC’s directives or recommendations arising from the exercise of its preventive function are enforceable by the Commission.

At the international level, the issue of corruption prevention is given special treatment under UNCAC. Chapter Two of UNCAC is dedicated to Preventive Measures.⁸² The prevention of corruption is more effective in environments that minimise opportunities, encourage integrity, allow for transparency, enjoy strong and legitimate normative guidance and integrate the efforts of the public sector, the private sector and civil society together.⁸³ The Task Force observed that some countries, such as France, invest more in prevention, than any other anti-corruption strategy, thereby reducing incidents of corruption.

4.2.2 Recommendations of the Task Force

To strengthen the execution of the preventive strategy for fighting corruption, the Task Force recommends the following measures:-

- a) Strengthening systems of work in all functions of the government through the identification of corruption loopholes and designing systems and procedures with a view to sealing corruption loopholes and other inefficiencies in order to promote and sustain good governance in public organizations.**
- b) Implementing and enforcing deterrent administrative sanctions against officers who circumvent procedures of work in order to engage in corrupt practices.**
- c) Incorporating corruption prevention as part of job descriptions for all Cabinet Secretaries, Principal Secretaries and Chief Executive Officers of Public Institutions with clear targets which forms the basis for their appraisal. To support this, there will be need for continuous training within the context of corporate governance for all executives to build their capacity to appreciate their role in corruption prevention.**
- d) Introducing and instituting legal and administrative sanctions to compel heads of public organizations to fully implement corruption prevention advice provided by EACC and to submit progress reports to EACC as required.**
- e) Instituting a system of enforcement of Codes of Conduct and Ethics, especially the introduction of an Ethics Tribunal for ethical breaches which may not be criminal.**
- f) Simplification of rules and procedures so as to make them citizen-friendly and avoid the need for citizens to approach public officials for intervention.**
- g) Establishment of Integrity Divisions in Ministries, Departments, and Agencies (MDAs). The Integrity Divisions should be staffed with Corruption Prevention Officers who are skilled in, and uphold the values of ethics and integrity. EACC and other state agencies would provide capacity-building to such officers.**

⁸¹*Ibid*, Section 11(1) (j).

⁸² See: Articles 5-14, the United Nations Convention Against Corruption, (United Nations, New York, 2004).

⁸³ United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the United Nations Convention against Corruption*, revised 2nd edition (United Nations, New York, 2012), at p. 15.

- h) **Employing modern technology/ ICT to enhance access to service delivery and to reduce corrupt activities. Adoption of technology reduces direct interface between the service providers and clients through provision of information and feedback on-line. Although this is being implemented under the E-Citizen portal there is need to expand it to include many government services.**
- i) **Improve management or automation of access to financial (wealth) declaration forms. There is a need to strengthen the provisions on access to financial declarations by EACC and other investigative bodies,**
- j) **Ensuring that all public organizations lay the appropriate foundations for corruption prevention such as:**
 - (i). **Establishment of corruption prevention committees in line with Guidelines provided by EACC.**
 - (ii). **Undertaking corruption risk assessments.**
 - (iii). **Establishment of Integrity Divisions where appropriate and/or strengthening Internal Audit systems to monitor corrupt practices.**
- k) **In line with Article 10(2) (c) of the Constitution on good governance, integrity, transparency and accountability, there is need for all concerned organizations to provide reports on compliance with that provision.**
- l) **Introducing corruption reporting and feedback mechanisms through the use of ICT.**
- m) **Implementing anti-corruption indicators by all public institutions and making reports to EACC as required under the performance contracting framework.**
- n) **All public bodies, especially state corporations, should implement *Executive Order No. 6 of March 2015*⁸⁴ and *Mwongozo: The Code of Governance for State Corporations* (January, 2015)(which prescribes a Code of Governance for State Corporations)⁸⁵ and file regular reports to the Presidency.**
- o) **Introduction of an award schemes for institutions and individuals that have notably contributed to corruption prevention and/or have evidently reduced corruption in their institutions in public and private sectors.**
- p) **Facilitate fair remuneration of all public servants in line with the cost of living. It is noteworthy that salaries of civil servants have not been increased since 2006/2007.**
- q) **Enhancing monitoring and compliance on the implementation of the measures above by EACC and other mandated institutions.**
- r) **Developing and implementing regulations for checks and balances in the exercise of discretionary powers. In this assignment, the Task Force established a close correlation between unfettered exercise of discretionary power and corruption. It was noted that most of the mega-corruption scandals which have taken place in the post-independence era, such as Goldenberg Affair⁸⁶, Anglo-Leasing, Triton, Maize Scandal, and Free Primary Education scam, among others, there was evidence of exercise of discretionary powers without accountability. This largely conforms with**

⁸⁴ H.E. Uhuru Kenyatta, EGH, *Executive Order No. 6 of 6th March, 2015* (Ethics and Integrity in the Public Service) (Nairobi: The Presidency, March, 2015).

⁸⁵ Republic of Kenya, *Mwongozo: The Code of Governance for State Corporations* (Nairobi: Public Service Commission & State Corporations Advisory Council (SCAC), January, 2015).

⁸⁶ See generally: Republic of Kenya, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair* (Chairman – The Hon. Mr. Justice S.E.O. Bosire, J.A.), Nairobi, October, 2005).

Robert Klitgaard's⁸⁷ conceptualization of corruption as: $C=M+D-A$ where "C" represents "Corruption", M (Monopoly of power), and "D" (Discretion), and "A" (Accountability)), which is to the effect that corruption occurs where there is monopoly of power coupled with discretion but there is little or no accountability.

- s) Providing incentives such as tax exemptions and cheap loan facilities for public officials to encourage a savings and development culture at an early age. Countries, such as Japan and Singapore that have been able to insist on such early self-development programmes and a saving culture for their public officers and citizens generally, sometimes even up to 50% of one's salary, have witnessed integrity and reduced levels of corruption. Thus, induction courses for all newly-recruited public officers and subsequent career development courses should deliberately lay emphasis on an officer's early self-development and a culture of saving e.g. through SACCOs, Investment Clubs ('chamas'), etc. Human Resource Officers/Integrity Assurance Officers should, therefore, take a keen interest in every public officer's personal development plan.
- t) In order to support all these measures, there will be need to allocate financial and human resources at the MDA and County levels for fighting corruption in the same way institutions allocate budgets for HIV/AIDS programs.
- u) Empowerment of citizens to resist the demand for bribes by instituting mechanisms like "Anti-Bribery Hot Lines" supported by a whistleblower protection scheme so that citizens can report solicitation of bribes or cases of corruption generally, so that EACC can take prompt action.

4.3 Education, Training and Public Awareness

4.3.1 Framework for Education, Training and Public Awareness

Education, training and awareness is a critical strategy in fighting corruption and promoting ethics and integrity in society. It focuses on enhancing public bodies' awareness of the risks of corruption inherent in the performance of their functions and helps to ensure discharge of functions in the correct, honourable and proper manner, as well as the general citizenry in understanding corruption, how it affects them and their role in fighting and preventing the vice.⁸⁸ The execution of the education, training and awareness anti-corruption strategy is undertaken by EACC and NACCSC.

As for EACC, the legal framework for the implementation of this mandate is based on the provisions of Section 11(1) (i) of the EACC Act. Thus, EACC is mandated to "raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the ACECA as to confidentiality"⁸⁹. Additionally, Section 13(2) (a) of EACC Act grants EACC the power to, "educate and create awareness on any matter within the Commission's mandate."

On its part, NACCSC undertakes this mandate within the framework of Gazette Notice No. 6707 of 19th September, 2014.⁹⁰ The Committee undertakes its mandate through, inter alia: imparting deeper understanding of corruption, types, manifestations and negative effects to

⁸⁷See: Klitgaard, *supra*.

⁸⁸Cf. See UNCAC generally, especially Article 6(1) (b) (on increase and dissemination of knowledge about corruption), and Article 13(1) (on promotion of the active participation of individuals and groups in raising public awareness on corruption).

⁸⁹Section 11(1) (i) of the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011).

⁹⁰Published in the *Kenya Gazette* issue of 26th September, 2014. NACCSC was originally established under Kenya Gazette Notice No. 4124 of 28th May, 2004.

elicit behavioural and attitudinal change; mobilization of the public to actively participate and take necessary action to prevent corruption by abstaining and reporting acts of corruption, recording statements with investigative agencies and adducing evidence in courts of law against suspects; garnering support for all the agencies in the criminal justice system that fight corruption, such as: the Judiciary, ODPP and EACC; social audits, promoting the embrace and practice of the national values as an effective tool to fight corruption (through a values-based anti-corruption campaign), and building alliances, collaborative partnerships and networks with civil society and non-state actors to undertake an effective awareness campaign through their established structures.

4.3.2 Recommendations of the Task Force

In order to strengthen the execution of the education, training and public awareness anti-corruption strategy, the Task Force recommends the following measures:-

- a) The Government should facilitate the mainstreaming of anti-corruption education in the curriculum within the formal education system. The agencies concerned in the curriculum review should facilitate the development of such content, namely: Kenya Institute of Curriculum Development (KICD), Ministry of Education, Science and Technology (MOEST), EACC, and OAG&DOJ. It does not have to be a stand-alone subject but anti-corruption studies be incorporated within the existing subjects such as Civics. Alongside anti-corruption studies, national values should also be taught.**
- b) The mandates of NACCSC and EACC should be clearly delineated so that NACCSC focuses on awareness creation for the general public while EACC focuses on public sector education.**
- c) Public awareness through sensitization on corruption be enhanced and mobilization of the general public to actively participate in the fight.**
- d) OAG&DOJ should spearhead or co-ordinate the provision of civic education on anti-corruption issues.**
- e) Strengthen anti-corruption civilian oversight bodies within the Counties e.g. County Anti-Corruption Civilian Oversight Committees (CACCOCs) and Community Anti-Corruption Monitors (CACMs) used or identified or deployed by NACCSC and the EACC respectively that co-ordinate community based anti-corruption monitoring and awareness. They also provide the corruption prevention support mechanisms for the local communities.**
- f) Public institutions should introduce internal oversight mechanisms through the deployment of integrity officers or ombudsmen who should be skilled officers in matter relating to anti-corruption.**
- g) Encourage the public to participate in the fight against corruption through continuous civic engagement in expenditure, budgeting, expenditure tracking and social audits of publicly-funded projects and programs.**
- h) The National Police Service should fully implement the provisions of Article 244 (b) of the Constitution - to prevent corruption and promote and practise transparency and accountability in dealing with corruption in the Police Service. In doing so, they should collaborate and partner with EACCC and other anti-corruption agencies.**
- i) IEBC, the Registrar of Political Parties, NACCSC, and Kenya Leadership Integrity Forum, in conjunction with EACC, should continuously educate the**

public on corruption issues relating to electoral processes, offences and campaign financing.

- j) There is need for the allocation of funds or budget for continuous voter education with regard to electoral processes, electoral offences, campaign financing and corruption.**
- k) The Government should fast-track the enactment and implementation of the Freedom of Information Act to facilitate public access to general information held by public bodies which could be used in identifying acts of corruption, and,**
- l) The Government should fast-track the enactment and implementation of a Whistleblower Protection Act to provide mechanisms for protecting informants or whistleblowers who report acts of corruption.**

4.4 Criminalisation

4.4.1 Framework for the criminalisation anti-corruption strategy

Criminalization of all forms of conduct which constitute corruption is an essential component in enhancing the fight against corruption and serves as deterrence to wrongdoing. The rationale behind the criminalisation strategy is to introduce criminal and other offences which cover a wide range of acts of corruption, to the extent that they are not already provided for under domestic law.⁹¹ The purpose of this strategy is not only to address basic forms of corruption, such as bribery and embezzlement of public funds, but also acts carried out in support of corruption, obstruction of justice, trading in influence and the concealment or laundering of the proceeds of corruption.⁹² Further, the criminalisation strategy also seeks to deal with corruption in the private sector, which is taken to be the supply side of corruption.

The criminalisation of corruption strategy is implemented mainly through a number of laws, such as: EACC Act; 2011; ACECA; POEA; LIA; POCAMLA; and PPDA, among others.

4.4.2 Recommendations of the Task Force

In order to strengthen the criminalisation strategy of fighting corruption, the Task Force recommends that:-

- a) All anti-corruption laws should be revised to criminalise all forms of corruption that are currently not criminalised in Kenya such as introducing express provisions to criminalise corruption within the private sector.**
- b) Criminalise all forms of corruption offences under UNCAC such as trading in influence, bribery in the private sector; criminalise all forms of corrupt activities within all public benefit organizations.**
- c) Fast-track the enactment of the Whistle Blower Protection legislation and Freedom of Information legislation.**
- d) Take measures to establish jurisdiction by the State over corruption, economic crimes and unethical conduct when committed-**
 - i) in the territory of Kenya;**
 - ii) aboard vessels or aircraft flying the Kenyan flag;**

⁹¹ United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the United Nations Convention against Corruption*, revised 2nd edition (United Nations, New York, 2012), at p. 2, Para. 6.

⁹²*Ibid.* See also generally, Chapter 3 of the United Nations Convention against Corruption, on *Criminalisation and law enforcement*. See also: Article 4 (Scope of Application) of the African Union on Preventing and Combating Corruption.

- iii) against a Kenyan national;
 - iv) by a Kenyan national;
 - v) by a person who is not a Kenyan national but has his/her habitual residence in Kenya;
 - vi) in any jurisdiction, as a predicate offence to an offence committed in Kenyan territory; and
 - vii) By a national of another state who is present in Kenya during the commission of the offence.
- e) Need to clearly define the jurisdiction on the enforcement of matters relating to corruption to avoid the multiplicity of agencies such as the EACC, DCI, CAJ, ODPP, and police engaging in the enforcement of same actions.
 - f) Introduce legal sanctions to political parties, candidates and their agents for engaging in corrupt activities.
 - g) Put in place measures for effective and efficient enforcement of laws relating to corruption, economic crimes and unethical conduct, through:-
 - i) Amendment of Section 25A (3) of ACECA on conditions given to suspected persons for cessation of investigations;
 - ii) Amendment of Section 39 of ACECA on bribery involving agents to expand the scope beyond agents;
 - iii) Amendment of Section 62 (6) of ACECA on suspension if charged with corruption or economic crime to lift the exemption of State officers and elected office holders charged with corruption and economic crime; and
 - iv) Amendment to Section 48 of ACECA to provide for stiffer sentences and asset forfeiture in relation to criminal proceedings.
 - h) Put in place effective mechanisms to enhance reporting of corruption, economic crimes and unethical conduct.
 - i) The need to prioritise enforcement of anti-graft legislation by enhancing both human and financial resources.
 - j) The need to ensure criminalisation of all recognised conduct constituting corruption and economic crime.
 - k) The need to provide for legal liability in respect of natural and legal persons for corruption, economic crime and unethical conduct.
 - l) Effective sanctions for corruption offences, whether penal, civil or administrative.
 - m) Exercise of jurisdiction by the state over all corruption and economic crimes occurring in whatever circumstances.
 - n) There is need to enhance the reporting of corruption, economic and related offences through various platforms.
 - o) Ensure that all persons involved in the commission or facilitation of corruption, economic crime and unethical conduct are held liable in law; be they legal or natural persons. Such liability may be criminal, civil or administrative.
 - p) Ensure that offenders are ultimately held liable for their actions, regardless of the time lapse between the commission of the offence on the one hand; and investigations and prosecution on the other.

- q) **Facilitate and enable freezing, seizure and confiscation of corruptly acquired assets before, during or after investigations, regardless of any jurisdiction in which the assets are located or situated.**
- r) **Criminalise corruption committed by a Kenyan or a Kenyan firm or company in a foreign jurisdiction. An example could be borrowed from the Foreign Corrupt Practices Act of 1977 (of USA)⁹³, the Bribery Act, 2010 (of UK),⁹⁴ and the OECD Anti-Bribery Convention⁹⁵ which criminalise the bribery of foreign public officials.**
- s) **Criminalise the failure of commercial organizations to prevent bribery. This should apply to all commercial organizations which have business establishments in Kenya. The offence should be one of strict liability, with no need to prove any kind of intention or positive action. A leaf could be borrowed from Section 7 of the Bribery Act, 2010 (UK) which criminalises failure by commercial organizations to prevent bribery. The provision is considered as very innovative as it helps in the fighting corruption in the private sector.**
- t) **A review of Section 48 of ACECA shows that it is sufficiently punitive. However, an analysis of conviction and sentences meted in the past shows that the problem has been one of failure to fully enforce the provisions for mandatory fines. Section 48 (1) (b) of ACECA provides for a mandatory fine which is hardly enforced.⁹⁶ It is recommended that the Judiciary (Anti-Corruption Courts) and the ODPP ensure full compliance with the provisions of this Section. Where needs-be, an application should be made for enhancement of the sentence.**
- u) **Enhance mechanisms of Asset recovery.**
- v) **Put in place measures for protection of reporting persons, witnesses, and victims; including sanctions against persons who threaten, harm or take adverse action against reporting persons, victims and witnesses.**
- w) **Ensure that in respect of corruption, economic crime and unethical conduct, the law does not grant any immunities or privileges which would hamper effective investigation, prosecution and adjudication over such conduct.**
- x) **Granted that Kenya's post-colonial history is riddled with rampant corruption, manifested through rampant embezzlement of public funds, which is akin to plunder in some jurisdictions, there is need to take decisive action against such acts of corruption. Though the ingredient of "embezzlement" in the definition of corruption under ACECA is a major milestone, it is argued that the Act should go further, like in the Philippines, to create an offence of "plunder".⁹⁷**

⁹³The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"), was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. For details, visit: <http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> .

⁹⁴ Section 6 of the Bribery Act, 2010 (UK) criminalises the bribery of foreign public officials. For the UK Bribery Act, 2010, visit: <http://www.legislation.gov.uk/ukpga/2010/23/contents> .

⁹⁵ See: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention> .

⁹⁶Cf: In *John Njenga Kinuthia v. R.* [2015] eKLR, G.W. Ngenye-Macharia, J, upheld the conviction and sentence where a magistrate's court had convicted the Appellant and sentenced him as per Section 48 of ACECA.

⁹⁷ In the Philippines, under the Republic Act No. 7080 (as amended by the Republic Act No. 7659(The Death Penalty Law)) – an Act defining and penalizing the crime of plunder, "any public officer who, by himself or connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt criminal acts as described in Section 1(d) hereof in the aggregate amount or a total of at least fifty million pesos (P 50,000,000) shall be guilty of the crime of plunder and shall be punished by *reclusion perpetua* to death.

4.5 Investigations

4.5.1 Framework for the Investigations Strategy

Investigation of all forms of conduct which constitute corruption is an essential component in enhancing the fight against corruption and deterrence of wrongdoing. Fair and effective enforcement of anti-graft legislation is an essential part of a functioning criminal justice system. The State, through its law enforcement agencies, must be able to competently exercise jurisdiction in respect of all recognized forms of corrupt conduct and unethical behaviour. An effective investigative process is absolutely essential for a successful prosecution and adjudication of corruption and economic crimes.

The investigations mandate of fighting corruption is vested in EACC. Section 11(1) (d) of the Act mandates EACC to “investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution.” Additionally, Section 13(2) of the Act grants EACC the power to “conduct investigations on its own initiative or on a complaint made by any person.”

The execution of the investigative function is undertaken in line with the provisions of ACECA.⁹⁸ Part IV of the Act addresses various aspects of investigations, such as: appointment and identification of investigators; investigation of complaints; cessation of investigations; provision of statement of a suspect’s property; requirement to provide information; production of records and property; search of premises; admissibility of things produced or found; surrender of travel documents; arrest of persons; disclosure that may affect investigation, and impersonating investigator.

It is noteworthy that under Section 23(1) of the Act, it is only the EACC Secretary or a person duly authorised by the Secretary who may conduct an investigation on behalf of EACC.⁹⁹ Under Section 24 of the Act, EACC investigators are supposed to bear identification documentation issued by EACC and signed by the Secretary.¹⁰⁰ This means that a law enforcement officer from any other agency, such as the Police, is not competent in law to undertake an investigation into allegations of corruption, unless they are authorised by the Secretary of EACC to investigate a corruption or economic crime offence.

In terms of reporting, the Act provides for submission of investigation reports to the DPP on the results of an investigation,¹⁰¹ preparation of quarterly reports (by EACC) on the number of reports made to the DPP under Section 35 of the Act (and other relevant statistical information). EACC is required to give a copy of the report to the AG, who is supposed to lay a copy of the report before the National Assembly. Under Section 37(1) of the Act, the DPP is required to prepare an annual report with respect to prosecutions for corruption and economic crime.

⁹⁸ Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

⁹⁹ Prior to the amendments introduced through the Statute Law (Miscellaneous) Amendments Act, 2014, the responsibility to undertake investigations was vested in the Director or a person authorised by the Director of the defunct Kenya Anti-Corruption Commission (KACC), the precursor to EACC.

¹⁰⁰ Section 24(2), Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

¹⁰¹ Section 35(1) of ACECA provides that, “Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation”. Cf.: In the case of *Stephen Mburu Ndiba v. Ethics and Anti-Corruption Commission & the Director of Public Prosecutions* [2015] eKLR, Justice Jairus Ngaa interpreted Section 32 of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), to mean that the Section grants EACC prosecutorial powers over corruption and economic crime matters, when read alongside Article 157 (12) of the Constitution.

4.5.2 Recommendations of the Task Force

In order to strengthen the investigative capacity of EACC, the Task Force recommends the following interventions:-

- a) The Government should make necessary changes in law to allow the use of specialised investigative techniques and admissibility of such evidence; and**
- b) There is need to strengthen capacity for international investigations, Mutual Legal Assistance and other forms of international assistance.**

4.6 Prosecution

4.6.1 Framework for Prosecution Anti-corruption Strategy

Dispute resolution in corruption matters is the process that involves the prosecution of cases in the courts. Prosecution is a power currently vested in the DPP who has the mandate of prosecuting all corruption and economic crime cases, amongst others, and giving directions to EACC.

The prosecution anti-corruption strategy is predicated upon Section 11(1) (d) of the EACC Act and Article 157 of the Constitution (which establishes the office of the Director of Public Prosecutions). Section 11(1)(d) of the EACC Act provides that EACC shall investigate, "...and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution". The Office of the Director of Public Prosecutions Act, 2013¹⁰² gives effect to the provisions of Article 157 and 158 of the Constitution relating to appointment, powers and functions of the DPP as well as the constitutional framework for the removal and resignation of the DPP.

4.6.2 Recommendations of the Task Force

To strengthen the prosecution strategy for combating corruption and economic crime, the Task Force recommends the following measures:-

- a) There is need to address the capacity of ODPP at the level of the institution and the individual prosecutors to capacitate them to deal with complex corruption cases.**
- b) There is need to strengthen inter-agency co-operation between ODPP and EACC.**
- c) ODPP should finalize the Guidelines on Plea Bargaining and conduct sensitization on the same.**
- d) Consider alternative dispute resolution in corruption cases. Those who seek to negotiate return of stolen assets should be encouraged rather than insisting on lengthy court processes whose outcome is uncertain.**
- e) EACC, in consultation with the DPP and the Cabinet Secretary/Attorney-General, should introduce periodic and conditional amnesty provisions for old and complex cases, which may not result in a conviction or asset recovery and thereby enhance national cohesion.**
- f) There is need to enhance efficiency of investigation and prosecution by conducting studies on a cost-benefit analysis of employing either strategy.**

¹⁰² The Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013) provides detailed provisions on the structure, composition, mandate, functions and exercise of the powers of the Office of the Director of Public Prosecutions.

- g) **There is need for clear procedures on the appropriate disciplinary action, prosecution and removal proceedings for elected leaders over the contravention of Chapter 6 of the Constitution of Kenya, 2010.**
- h) **ODPP should co-ordinate a review of the Evidence Act (Cap. 80), the Criminal Procedure Code (Cap. 75), and the Penal Code (Cap. 63), with a view to ensuring that the three pieces of legislation are up-to-date for purposes of facilitating the application of modern technology, techniques and best practices in the investigation, prosecution and adjudication of crimes generally, and particularly corruption and economic crimes. Other key stakeholders in the fight against corruption should also be brought on board, such as: EACC; OAG&DOJ; Judiciary; DCI and KRA, among others.**
- i) **There is need for enhanced training for investigators, judicial officers and prosecutors handling corruption and economic crime matters.**

4.7 Adjudication

4.7.1 Framework for Adjudication of Corruption and Economic Crimes

Adjudication of corruption and economic crimes is a key strategy in the fight against corruption. The power to adjudicate over corruption and economic crime matters is vested in the Judiciary. According to Article 159(1) of the Constitution, judicial authority “is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”.

The responsibility to try corruption and economic crime matters is vested in special Magistrates, as per the provisions of Part II of the Anti-Corruption and Economic Crimes Act, 2003. Section 3(1) of the Act grants the Chief Justice the power to appoint special Magistrates, through notification in the *Kenya Gazette* to try offences under the Act and any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in the Act. The offences specified under the Act are only triable by special Magistrates.¹⁰³ Since 2012, the Chief Justice has gazetted up to 160 special Magistrates, which means that there is a special Magistrate to try corruption and economic crime cases in every County.

The special Magistrates are also empowered to try any other offence with which the accused may be charged in the same trial. Section 4(4) of the Act provides that a special Magistrate shall, as far as practicable, hold the trial of an offence on a day-to-day basis until completion. Section 5 of the Act provides for the procedure and powers of special Magistrates. The Judiciary has established a system of Anti-Corruption Courts within the existing arrangement of subordinate courts.¹⁰⁴ The courts are presided over by special Magistrates, in line with the provisions of Section 3 of ACECA.

4.7.2 Recommendations of the Task Force

In order to enhance the framework for the adjudication of corruption and economic crimes, the Task Force recommends that:

- a) **In line with the provisions of Section 4(4) of the Anti-Corruption and Economic Crimes Act, 2003, special Magistrates should hold trials of offences under the Act on a day-to-day basis until completion.**

¹⁰³Section 4(1), Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

¹⁰⁴ In 2002, the then Chief Justice (Hon. Justice Bernard Chunga) launched the first Anti-Corruption Court in Nairobi.

- b) **The filling, hearing and determination of corruption and economic crime cases should, as much as possible, be decentralized to other courts to avoid overburdening one station (Nairobi).**
- c) **Special Magistrates for corruption and economic cases, as far as is practically possible, should not be assigned other cases.**
- d) **Newly-gazetted special Magistrates should be taken through an appropriate capacity-building and training programme to enhance their skills, knowledge and capacity to handle complex corruption and economic crimes cases.**
- e) **The courts need to put into practical use conviction-based recovery of assets from corrupt culprits.**
- f) **Many corruption and economic crime cases have stalled before special Magistrates due to a plethora of judicial review and constitutional reference applications. There is need for a thorough study into the effect of multiple constitutional and judicial review applications in the administration of justice. As such, the Chief Justice should commission a study, under the auspices of the National Council on Administration of Justice, for purposes of determining the appropriate mechanism for addressing the backlog of corruption and economic crime cases caused by a plethora of constitutional references or judicial review applications in such matters.**
- g) **The Judiciary (Chief Justice) should establish an Anti-Corruption and Economic Crimes Division of the High Court with original jurisdiction to hear complex corruption and economic crime cases, serious fraud, and money laundering cases, including recovery of proceeds of such crimes based on the following criteria: value of the alleged loss; complexity of the case; character of the fraudulent scheme; impact or extent of loss; profile of personality or office involved; public interest, or other similar consideration. The Court will also be determining any consequential applications based on judiciary review or alleged breach of a subject's constitutional rights. Consequently, it is recommended that the High Court Organisation and Administration Bill, 2015, be amended to provide for the proposed Division. In Malaysia, the Judiciary has such a High Court Division, serviced by Anti-Corruption Judges, thereby ensuring expeditious disposal of such matters.**
- h) **The judges for the proposed Anti-Corruption and Economic Crimes Division, as well as the Special Magistrates (provided for under the Anti-Corruption and Economic Crimes Act, 2003) should handle corruption matters exclusively.**
- i) **The Judiciary should develop and implement special rules and procedures for the adjudication of corruption and economic crimes cases.**
- j) **There is need to demystify and simplify court processes and procedures to facilitate access to courts as a forum for adjudication of disputes so as to curb the practice of "brokers" who exploit general ignorance of the law or court procedures to exploit vulnerable members of the society.**
- k) **The Anti-Corruption and Economic Crimes Act, 2003 should be amended to introduce special rules for the preservation of accounts and assets that are subject of investigations and judicial proceedings.**

4.8 Asset Recovery

4.8.1 Framework for Asset Recovery

Asset recovery entails tracing and restitution of either the public property that was corruptly-acquired or assets that were derived from corrupt practices. Asset recovery is a useful tool in fighting corruption because it has the effect of depriving those who engage in economic crime of the assets they acquired corruptly, thus making corruption unattractive. In Kenya, asset recovery is largely undertaken by two key institutions: EACC, and the Assets Recovery Agency (ARA). The two institutions undertake asset recovery within the framework of ACECA, and POCAMLA¹⁰⁵ respectively. The Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulations, 2011¹⁰⁶ address issues of amnesty and restitution in deserving cases; under the supervision of KACC (now EACC).

4.8.2 Recommendations of the Task Force

In order to enhance the asset recovery strategy for fighting corruption, the Task Force recommends that:

- a) There is need to establish proper recovery and restoration mechanisms.**
- b) Strengthen the Financial Reporting Centre to share information on suspicious financial transactions.**
- c) Harmonise the asset recovery laws to create only one competent authority to deal with assets recovered from criminal activities including corruption. EACC should undertake asset recovery arising from corruptly-acquired assets while ARA should undertake asset recovery arising from the proceeds of other crimes.**
- d) Establish international linkages to facilitate asset recovery from other jurisdictions.**
- e) The Government should establish systems to ensure transparency and accountability in the management of repatriated funds and recovered assets.**
- f) Enhancing existing public financial management systems and setting up autonomous and controlled funds for the recovered assets.**
- g) The Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulations, 2011¹⁰⁷ should be reviewed and operationalised, and,**
- h) The Government should facilitate the establishment of a special fund for purposes of ensuring that the proceeds of the recovered assets are utilised towards the realisation of the obligations of the State over economic and social rights under Article 43(3) of the Constitution.**

4.9 International Co-operation

4.9.1 Framework for International Co-operation

International co-operation is a key plank in the fight against corruption. Both UNCAC¹⁰⁸ and AUCPCC¹⁰⁹, of which Kenya is a State Party, have identified international co-operation as

¹⁰⁵The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009).

¹⁰⁶Legal Notice No. 44 of 2011. The Regulations were made by the Minister for Justice, National Cohesion and Constitutional Affairs, pursuant to the provisions of Section 68 of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

¹⁰⁷Legal Notice No. 44 of 2011.

¹⁰⁸ See: Articles 43-50 (Chapter IV) of the United Nations Convention against Corruption,

¹⁰⁹ Article 18, AU Convention on Preventing and Combating Corruption.

critical to the fight against corruption at the national and international levels. International co-operation encompasses various forms of co-operation countries should render to each other in every aspect of the fight against corruption, such as: prevention, investigation and the prosecution of offenders.

In line with the principles of international co-operation, countries are required to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Similarly, countries are also required to carry out various measures geared towards supporting the tracing, freezing, seizure and confiscation of the proceeds of corruption.

To facilitate international cooperation over the fight against corruption and other crimes, Kenya has put in place a number of legal instruments, such as: the Extradition (Commonwealth Countries) Act,¹¹⁰ the Extradition (Contiguous and Foreign Countries) Act,¹¹¹ the Proceeds of Crime and Anti-Money Laundering Act, 2009, the Mutual Legal Assistance Act¹¹², and the Fugitive Offenders Pursuit Act,¹¹³ among other legal instruments.

Under Section 5 of the Mutual Legal Assistance Act, the AG is the Central Authority for processing all requests to and from Kenya regarding mutual legal assistance. Once the AG receives such requests, he channels the requests to the relevant Competent Authorities,¹¹⁴ such as ODPP, EACC, and DCI, among others. To enhance the provision of his role as the Central Authority for MLA, the AG has appointed an Acting Director of the MLA Central Authority.

In the execution of their specific mandates of investigation and prosecution of corruption and economic crimes, both EACC and ODPP, have requested for and afforded international co-operation (mutual legal assistance) notably in cases like Kenya Transport Urban Infrastructure Programme (KUTIP) case (*R. v. Livingstone Maina Ngare*),¹¹⁵ the Anglo Leasing and Anglo-Leasing-type contracts, and *The Tokyo Embassy case (R. v. Thuita Mwangi)*¹¹⁶, among others.

In the same vein, Kenya has sought the extradition of Yagnesh Devani in the *Triton Case (R. v. Yagnesh Devani)*¹¹⁷. On her part, Kenya has been requested by Jersey to extradite some individuals to face some charges over corruption and economic crimes allegations. In that regard, extradition proceedings have been initiated by the DPP against Mr. Samuel Gichuru and Mr. Chris Okemo.

4.9.2 Observations of the Task Force

The Task Force made the following observations regarding the challenges faced in international co-operation in the fight against corruption, in the Kenyan context:

- a) Delay in the processing of MLA requests made to foreign countries.
- b) Insufficient assistance due to different legal systems.

¹¹⁰ Cap. 77 of the Laws of Kenya.

¹¹¹ Cap. 76 of the Laws of Kenya.

¹¹² Act No. 36 of 2011. The long title to the MLA Act describes the Act as, “An Act of Parliament to provide for mutual legal assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters, and for connected purposes”.

¹¹³ Cap. 87 of the Laws of Kenya.

¹¹⁴ Section 2 of the Mutual Legal Assistance Act defines a as “Competent Authority” means the Attorney-General of the Republic of Kenya, any criminal investigation agency established by law, or any other person designated as such by the Attorney-General by notice in the *Gazette*.

¹¹⁵ Cf. In *Livingstone Maina Ngare v. R* [2011] eKLR, the High Court authorized the taking of evidence by video conference.

¹¹⁶ Cf. *Thuita Mwangi and 3 Others v. Ethics and Anti-Corruption Commission & 3 Others* [2013] eKLR.

¹¹⁷ Cf. *R v. The Kenya Anti-Corruption Commission and 2 Others* [2009] eKLR. See also: *Yagnesh Devani & 4 Others v Joseph Ngindari and 3 others Civil Application* (No. Nai. 136 of 2004 (UR 72/2004)).

- c) Language barriers since some of the documents are submitted in the official language of the requested state, which may not be English.
- d) Preliminary, judicial review and constitutional petitions challenging the provision of MLA or extradition of suspects.
- e) Conflicting mandates in the public bodies involved in the execution of MLA requests.

4.9.3 Recommendations of the Task Force

To strengthen international co-operation in the fight against corruption, the Task Force recommends that:-

- a) **OAG&DOJ puts in place measures to review Kenya's processes in the provision of mutual legal assistance.**
- b) **OAG&DOJ should expedite the processing of mutual legal assistance requests to and from other jurisdictions.**
- c) **The Government should fast-track the enactment of a Transfer of Criminal Proceedings and Sentenced Persons legislation.**
- d) **OAG&DOJ and ODPP should facilitate the conduct of the review of the provisions on the Criminal Procedure Code¹¹⁸ with regard to transfer of criminal proceedings and sentenced persons.**
- e) **The Government should restrict relations with foreign countries, companies or individuals, including Kenyans living abroad, who engage in or condone corruption.**
- f) **The legal framework for mutual legal assistance and extradition should be harmonised with the relevant provisions of UNCAC and AUCPCC.**
- g) **Enhancement of law enforcement co-operation between Kenyan law enforcement agencies and law enforcement agencies of other countries in the fight against corruption and economic crime, including but not limited to the conduct of joint investigations and application of special investigative techniques.**
- h) **Mechanisms should be provided for co-operation among law enforcement agencies in Kenya in the fight against corruption and economic crime, including in the conduct of joint investigations and the deployment of special investigative techniques.**
- i) **A legal framework should be developed to address the issue of the transfer of criminal proceedings and sentenced persons in criminal matters,¹¹⁹ and,**
- j) **There is need for some policy guidance on the question of the sharing of costs of executing mutual legal assistance requests, considering the fact that the execution of some MLA requests may have substantial financial implications.**

4.10 Social Accountability and *Qui Tam* Actions

4.10.1 Framework for Social Accountability and *Qui Tam* Actions

For Kenya to win the war against corruption, there is need to involve the people and non-state actors in the fight against the vice. Indeed, Paragraph 3(g) of the TORs of the Task Force requested the Task Force to “*consider the role of Non-State Actors, such as religious organisations, civil society, media, and the private sector in the fight against corruption*”. The Task Force interpreted this TOR to be also encompassing the role of ordinary citizens in the

¹¹⁸ The Criminal Procedure Code (Cap. 75 of the Laws of Kenya).

¹¹⁹ Art. 45 of UNCAC.

fight against corruption. One of the most effective strategies in the fight against corruption is the use of social accountability as a tool for ensuring that public funds allocated to public entities or for public projects are utilised for the intended purpose — in a transparent and accountable manner.

The issue of accountability has been given the pride of place in the current constitutional dispensation. Article 10(2) (c) of the Constitution recognises “good governance, integrity, transparency and accountability” as some of the fundamental national values and principles of governance. Accountability is the capacity to require those in public decision making positions to answer for their policies, actions, decisions and the use of resources within their control. Social accountability, therefore, may be defined as the proactive engagement and participation of the citizen and the civil society with the State with the objective of instilling or reinforcing openness and answerability.¹²⁰ Malena Carmen *et al* define social accountability as, “...an approach toward building accountability that relies on civic engagement, i.e., in which it is ordinary citizens and/or civil society organizations that participate directly or indirectly in exacting accountability.”¹²¹

As an anti-corruption strategy, social accountability is realized when there is convergence of two necessary channels: voice and hearing. This calls for a mechanism for provision of voice and space for proactive citizen engagement and participation of the people in public policy formulation and implementation, on the one hand. On the other hand, it encompasses a mechanism for the improvement of government’s readiness to hear what the citizens are saying (positive reception) and respond appropriately to their demands. The mechanisms work better if they are initiated or actively supported or passively permitted by the Government.

Application of the principles of social accountability will bring in the political incentives so necessary to dislodge vested interest and spur political will to check corruption. In the same vein, social accountability creates enthusiasm for stakeholders to actively participate in such accountability programmes and activities. One of the best approaches for ensuring sustainability of social accountability is the use of *qui tam* actions.

Qui tam actions are suits commenced by a private citizen (popularly known as a whistle blower) against a person believed to have violated the law particularly in the performance of a contract with the government. *Qui tam* suits are brought on behalf of the government as well as the plaintiff since the plaintiff is entitled to a share of the recovered damages. The share takes the form of a reward for exposing the wrong-doing as well as compensation for the service or effort in recovering the funds on behalf of the government. In the common law legal system, *qui tam* is a writ that allows a private individual to have a share of the penalty imposed on account of assisting in the prosecution of the wrong doing.¹²² In England and Wales, the writ fell into disuse with the enactment of the Common Informers Act, 1951. However in the United States, *qui tam* provisions were promulgated under the False Claims Act.¹²³ Under the False Claims Act, a private citizen (not public or state servant) is permitted

¹²⁰ See World Bank’s analysis of various social accountability mechanisms used in titled, ‘From Shouting to Counting: A New Frontier in Social Development.’ Available at the World Bank website, <http://go.worldbank.org/Y0UDF953D0>. See also: Anwar Shar (ed.), *Performance Accountability and Combating Corruption*, (The World Bank: Washington, DC, 2007).

¹²¹ Malena Carmen, Foster Reiner and Singh Janmejaj, ‘Social Accountability: An Introduction to the Concept and Emerging Practice.’ Social Development Papers, Paper No. 76, December 2004. Available at <http://siteresources.worldbank.org/INTPCENG/214578-1116499844371/20524122/310420PAPEROSo1ityOSDPOCivicOno1076.pdf>

¹²² *Qui tam* is the short form of the longer Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which is loosely translated to mean “he who brings a case on behalf of our lord the King as well as for himself.”

¹²³ 31 USC No. 3729 (also known as the Lincoln Law). The law was passed by the Congress on 2nd March 1863 during the tenure of Abraham Lincoln as President of the United States. The initial drive was to recover illicit

to bring a claim against contractors for fraudulent claims against the State. If the claim succeeds, the plaintiff stands to receive a portion of between 15-25 per cent of the recovered damages. This acts as a major motivator to persons who would like to stop fraudulent claims against the Government.

In the Kenyan context, there is no express provision for *qui tam* actions. In Kenya, the responsibility to defend the public interest is vested in the AG. Article 156(6) of the Constitution provides that, "the Attorney-General shall promote, protect and uphold the rule of law and defend the public interest". Nevertheless, EACC has a mandate (Part VI of ACECA), to recover public assets lost or improper benefits acquired through corrupt conduct or economic crimes.¹²⁴

In the East African region, rudimentary *qui tam* provisions are available in Rwanda's Anti-Corruption Law (No. 23 of 2003).¹²⁵ Article 37 thereof provides that:-

The court will preserve a bonus for whoever will have contributed to the denunciation of offences provided by this law without participating in the commission of these offences.

The bonus shall be paid as follows:

- a) 1/10 of the value of property confiscated from the author of the offence 10,000 RWF to 20,000 RWF that shall be paid by the guilty person where the offence denounced could not lead to confiscation of property.

Qui tam actions would be very handy in terms of curbing corruption in some of the corruption-prone sectors in Kenya, such as: procurement, construction, health-care, immigration, transport, and revenue collection. However, just like in the US context, some exemptions may be imposed from *qui tam* actions, in the interest of national security. Such actions could be initiated by individual citizens or non-state actors like civil society organisations, religious organisations, professional organisations (such as the Law Society of Kenya (LSK)) and even Community-Based Organisations (CBOs).

4.10.2 Recommendations of the Task Force

In order to strengthen the mechanism of social accountability and the use of *qui tam* actions in the fight against corruption, the Task Force recommends the following measures:

- a) **The national government and county governments should put in place mechanisms for social accountability in the financing, execution and implementation of projects funded from public coffers.**
- b) **OAG&DOJ should develop a Bill to provide for *qui tam* actions. Like in USA, Kenya could come up with a False Claims Bill. Indeed, Kenya has had enough share of false and fraudulent claims, which necessitated the President of Kenya to establish the Pending Bills and Closing Committee (PBCC).¹²⁶ One of the recommendations of PBCC was the enactment of a False Claims Act to curb false and fraudulent claims against the Government.**

gains from contractors who supplied decrepit war-related supplies to the Government of the United States during the American Civil War (1861-1865). See: http://en.wikipedia.org/wiki/False_Claims_Act#cite_ref-0

¹²⁴ See generally: Part VI (Compensation and Recovery of Improper Benefits), Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

¹²⁵ Law No. 23 of 2003 which aims at prevention, suppression and punishment of corruption and related offences. English version available at the official website of the Office of the Ombudsman of Rwanda: www.ombudsman.gov.rw,

¹²⁶ Gazette Notice Number 297 of 12th January, 2005 (vide The Kenya Gazette, Nairobi, 14th January, 2005).

- c) Use of *qui tam* actions is cheap and beneficial to both the Government and persons who bring in *qui tam* actions. The Government does not incur any direct costs in the conduct of such actions, yet it indirectly benefits from reduced levels of corruption. It results in punishment plus restitution, and permanent deprivation of the proceeds of crime. Above all, the citizens would also be happy to earn something out of pursuing corruptly-acquired property, and,
- d) Just like Rwanda, Kenya should adopt some rudimentary *qui tam* provisions in its anti-corruption and public procurement laws so as to facilitate the initiation of *qui tam* actions. Such provisions are common in revenue laws and are used for purposes of increasing revenue collections while also rewarding those who provide information which leads to tax recoveries.

4.11 Leadership and Integrity

4.11.1 Framework for the Promotion of Leadership and Integrity

One of the fundamental innovations of the Constitution of Kenya, 2010, is leadership and integrity. In particular, Article 10 (National values and principles of governance) and Chapter Six (Leadership and Integrity) of the Constitution seek to achieve servant and transformational leadership by demanding high standards of integrity and ethical conduct for State and Public Officers. Article 10 is even more onerous in that its provisions are binding on all State organs, State officers, public officers and all persons whenever any of them is applying or interpreting the Constitution or enacting, applying or interpreting any law, or making or implementing policy decisions.¹²⁷ Those ideals are predicated upon the assumption that State officers carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach.

Besides the Constitution of Kenya, there are a number of laws which have been put in place to address issues of leadership and integrity. Some of these laws are: LIA; EACC Act and POEA. The principal actor in the implementation of the leadership and integrity strategy of fighting corruption is EACC, by virtue of the provisions of Article 79 and 80 of the Constitution, Section 4(2) of LIA, and Section 11(1) (d) of the EACC Act. The other key actors in the implementation of this strategy is the DPP, who may prosecute persons recommended for prosecution by EACC, in line with Section 11(1) (d) of LIA. And needless to say, the Judiciary would also be a key actor in the implementation of the strategy by virtue of its constitutional role over adjudication. However, LIA has not comprehensively provided for mechanisms of determining compliance with Chapter Six of the Constitution for individuals seeking appointive and elective positions in State and public offices.

In order to ensure the sustainability and realise the potential benefits of ethical leadership, Section 53 of the LIA provides for leadership education and training generally. In that regard, the Cabinet Secretaries responsible for leadership and integrity, constitutional affairs (AG), education (Education, Science and Technology), and the public service (Devolution and Planning) shall collaborate with EACC and the relevant public entity for the purpose of developing and overseeing the provision of long-term education and training on leadership and integrity to – all public officers, all levels of the education system, and the public. If such a programme is adopted and implemented, all public officers and all students will be educated on leadership and integrity. Similarly, there will be a comprehensive civic education to members of the public on leadership and integrity.

4.11.2 Recommendations of the Task Force

To promote leadership and integrity as a key anti-corruption strategy, the Task Force recommends the following measures:

¹²⁷ See: Article 10(1) of the Constitution of Kenya, 2010.

- a) **Review LIA with a view to re-introducing the enforcement provisions set out in the initial Leadership and Integrity Bill, 2012, regarding the clearance and vetting of persons seeking election or appointment to a State office or public office.**
- b) **There is need for clear procedures for the appropriate disciplinary action, prosecution and removal proceedings for elected leaders who contravene Chapter Six of the Constitution of Kenya, 2010.**
- c) **EACC, OAG&DOJ and Kenya Law Reform Commission (KLRC) should undertake a review of all existing legislations concerning leadership and integrity with a view to harmonising all the Codes of Conduct and Ethics to be in line with the provisions of the Leadership and Integrity Act, 2012.**
- d) **There is need to simplify the cumbersome procedures for access to wealth declaration information (of public officers) by relevant enforcement agencies.**
- e) **Strengthening partnerships with non-state actors with a view to enforcing ethics and integrity among the non-state actors.**
- f) **Establish a multi-agency frame work for vetting and sharing of information for persons seeking elective and appointive public positions.**
- g) **A person who has been debarred by a professional body of which he is a member shall not be eligible for appointment (or promotion) or election to a State office or public office.**
- h) **To avoid cases of conflicts of interest, State officers or public officers who hold majority or controlling shareholding in private companies should not conduct business with those companies whether directly or indirectly.**
- i) **The Government should blacklist individuals and companies involved in compromising services being administered to citizens and the general public.**
- j) **Enhancing of vetting mechanisms for public elective and appointive positions by publishing and publicizing lists of candidates for elective and appointive positions, as well as encouraging public participation in the vetting process.**

CHAPTER FIVE: FIGHTING CORRUPTION IN THE DEVOLVED SYSTEM OF GOVERNMENT

5.1 Introduction

This Chapter delves into the fight against corruption under the devolved system of government. It is based on Paragraph 3(f) of the Terms of Reference of the Task Force which required the Task Force to “*consider and propose appropriate mechanisms for preventing and combating corruption in the devolved system of government and in the management of devolved funds.*”

Devolution is one of the most transformative changes in the governance framework under the Constitution of Kenya, 2010. It seeks to empower Kenyans to have greater influence in the decision-making process in matters of development and governance at the local level. Devolution also seeks to bring Government institutions to the local level. The Constitution provides that the country will be governed through the National and 47 county governments. The governments at the National and County levels are distinct and inter-dependent and are required to conduct their relations on the basis of consultation and cooperation.¹²⁸

Devolution in Kenya was introduced with the expectation that it would be one of the main drivers of development, poverty eradication and the realisation of the Kenya Vision 2030 goals. Its objectives as provided for under Article 174 of the Constitution of Kenya, 2010 are to:- promote democracy and accountability in the exercise of power; foster national unity by recognizing diversity; and give to the people the powers of self-governance with a view to enhance their participation in decision making processes at all levels of government.¹²⁹

National resources are devolved to county governments to enhance service delivery and access to services. The county governments are further empowered to: collect revenue; offer services; procure goods, services and works relevant to service delivery; hire staff and manage the resources of the County on behalf of the people of that County.

Corruption and unethical conduct have been identified as some of the major threats to the realization of the objects of devolution and the goals of Kenya Vision 2030. According to the EACC's *Ethics and Corruption Survey, 2014*,¹³⁰ corruption is prevalent in the Counties at the rate of between 1% and 3.5% across all the 47 Counties. The study identifies the most corruption-prone areas as: public procurement and disposal, public financial management, human resource management and revenue collection.

5.2 Linkage between the National and County Governments

The devolved system of government is established under Chapter Eleven of the Constitution as read with Articles 1(3) and (4), 6 (2) and 10 of the Constitution of Kenya, 2010. Article 1(3) and (4) establishes the two levels of government in Kenya; the National Government and the County Governments. Article 6(2) of the Constitution describes the governments at the two levels as being distinct (different responsibilities) and inter-dependent (meaning that the two levels of government must work together and not in isolation of each other) and which should conduct their mutual relations on the basis of consultation and cooperation. It is, therefore, devolution not based on the principle of absolute autonomy but instead, on the principles of inter-dependence and co-operation. Article 10(2) (a) of the Constitution identifies

¹²⁸ Article 6(2) of the Constitution of Kenya.

¹²⁹ On the devolved system of Government in Kenya generally, see: Republic of Kenya, *Final Report of the Task Force on Devolved Government: A Report on the Implementation of the Devolved Government in Kenya (Vol. I)* (Chairman: Mr. Mutakha Kangu) (Office of the Prime Minister and Ministry of Local Government, 2012).

¹³⁰ Ethics and Anti-Corruption Commission: *Ethics and Corruption Survey*, Nairobi, 2014. For more details, visit: the EACC website: www.eacc.go.ke.

devolution and sharing of power as values and principles that should guide Kenya's governance systems.

The respective functions of the National and County governments are set out in Article 186 of the Constitution as either exclusive functions, concurrent functions or residual functions while Article 189 of the Constitution provides for co-operation between the national and county governments. The Constitution also requires that governments at either level shall assist, support and consult, as appropriate, and implement the legislation of the other level of government. The Constitution further provides that government at either level shall liaise with government at the other level for purposes of exchanging information, co-ordinating policies and administration and enhancing capacity.

The two levels of government should co-operate, but not subordinate each other. None is an agent of the other, as the two are distinct in their constitutional functions, institutions, resources and legal frameworks. Distinctness in this sense rules out the concept of hierarchy as a relational principle. In effect, each level of government must have the freedom to make decisions in the functional areas assigned to them by the Constitution without undue interference from the other. Indeed, the principle of inter-dependence requires a certain measure of mutual interaction between the two levels of government in a manner that respects the functions of each government.

Article 189(1) (a) of the Constitution requires the government at either level to perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of the government at the other level and, thus respects the constitutional status and institutions of government at the other level and in the case of county government, within the county level. Each level is, thus, created and protected by the Constitution, with the functions and resources to be used for their discharge being set out and defined by the Constitution.

5.2.1 Management of Devolved Funds

Over the last few years, several 'devolved' funds have been established with the objective of providing financing to projects at the local level. Examples of such funds include:- the Constituency Development Fund (CDF); the Road Maintenance Levy Fund (RMLF); the Youth Enterprise Fund (YEF); the Women Enterprise Fund (WEF); the Poverty Eradication Loan Fund (PELF); the Free Primary Education (FPE); Constituency Bursary Fund (CBF); the Rural Electrification Programme Levy Fund (REPLF); the HIV/AIDS Fund; the Community Development Trust Fund (CDTF); and the Water Services Trust Fund (WSTF), among others. These funds are administered under separate management structures.¹³¹

Although the above Funds have been major drivers for service delivery and local development in general, they have equally experienced challenges that often lead to corrupt practices. These challenges and criticisms include lack of co-ordination, jurisdiction overlaps and duplication, high administrative costs, inadequate public participation, confusion amongst citizens on how the Funds are being accessed, mismanagement, conflict of interest, nepotism, corruption and poor accountability, among others.

5.2.2 General Recommendations of the Task Force

Towards this end, the Task Force recommends:-

- a) **County Governments should put in place structures to implement the Policy on *National Values and Principles of Governance Policy* and other good governance policies.**

¹³¹Government of the Republic of Kenya, *Sessional Paper on Devolved Government*, Nairobi, 2014.

- b) **Prevention of corruption by establishment of offices of oversight or watchdog institutions e.g. EACC, KENAO, PPOA, OCOB at the County level to help in creating public awareness, training and capacity-building on corruption prevention.**
- c) **The Government should facilitate the expansion of EACC so that it establishes offices in all the 47 counties of the Republic and where necessary, in some of the sub-counties just like ODPP. Article 6(3) of the Constitution provides that, “A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service”.**
- d) **The Government, through the Ministry of Devolution and Planning, should facilitate the establishment of Huduma Centres in all the 47 counties of the Republic, and if possible, in some sub-counties, to facilitate public access to a one-stop-shop for commonly-required government services which have in the past been used as avenues for corruption.**
- e) **There is need to mainstream the fight against corruption into the management of counties. The strategies used to fight corruption at the national level could be modified and backed-up by more innovative anti-corruption measures in order to address rising levels of corruption in the devolved units.**
- f) **OAG&DOJ and KLRC should provide the necessary technical support to County Governments and County Assemblies to ensure that the laws passed by County Assemblies measure up to the expected legislative standards and that they do not conflict with national legislation (except where the matter in issue is within the exclusive jurisdiction of the counties) or other laws of the concerned county. Towards that end, Counties may wish to consider the new legislative guide issued by the Kenya Law Reform Commission — *A Guide to the Legislative Process in Kenya*,¹³² and,**
- g) **There is need to decentralize the national inter-agency arrangements for fighting corruption to the counties. This would enhance synergy and effectiveness in the execution of anti-corruption interventions.**

5.3 Corruption-Prone Areas in the Devolved System of Government

5.3.1 Revenue Collection

5.3.1.1 Legal Framework on Revenue Collection

County Governments are required by the Constitution to be self-sustaining. Article 175 (b) of the Constitution of Kenya requires county governments to have reliable sources of revenue to enable them to govern and to deliver services effectively. They are empowered by the Constitution, the County Government Act, 2012¹³³ and Part IV of the Public Finance Management Act, 2012¹³⁴ to collect revenue. This notwithstanding, Article 202 of the Constitution provides for equitable sharing of revenue raised by the National government to be shared equitably between the national government and the county governments.

5.3.1.2 Situational Analysis on Revenue Collection

Administration of revenue remains challenging as to the extent to which counties may collect their own revenue. The Reports of the Office of the Controller of Budget and studies by a

¹³² Kenya Law Reform Commission: *A Guide to the Legislative Process in Kenya*, (Nairobi: Kenya Law Reform Commission, 2015). The Guide was launched on 28th August, 2015.

¹³³The County Governments Act, 2012 (No. 17 of 2012).

¹³⁴The Public Finance Management Act, 2012 (No. 18 of 2012).

number of stakeholders confirm that a good number of counties have no capacity to discharge the function of administration of revenue. For instance, it has been observed that revenue collection by some county governments have decreased as compared to what the defunct local authorities used to collect yet the county governments control a larger jurisdiction. This has been attributed to a number of factors including delays in enacting relevant revenue administration and collection laws, lack of efficient frameworks for revenue collection, massive pilferage of local authority revenue and heavy reliance on National Government allocations by the Counties.

5.3.1.3 Recommendations of the Task Force

The Task Force recommends:-

- a) That revenue collection needs to be automated. The National Treasury should implement an integrated revenue collection system for use by the County Governments thus ensuring standardisation across the county governments. The National Treasury is empowered by Articles 190 and 226 of the Constitution as read together with Section 12(e) of the Public Finance Management Act to direct on the appropriate financial management system to be used by the Government.**
- b) The full implementation of IFMIS and e-procurement at the county, sub-county and ward levels. This will ensure there is an accurate financial-tracking system of procurement and expenditure as budgeted and approved. Nonetheless, the implementation of the “integrated financial management solutions” should facilitate the effective discharge of county functions and respect the financial autonomy of counties granted under the Constitution and other relevant legal instruments.**
- c) Provision of performance-based incentives. Increase allocations to County Governments that demonstrate efficiency in revenue collection and service delivery.**
- d) Enactment of laws governing revenue collection by all counties. This is to avert a situation of reliance on by-laws, which were commonly-used by the former local authorities as the basis for revenue collection.**
- e) Collaboration between the county governments and the Kenya Revenue Authority (KRA) in the selection, recruitment and training of professional revenue collectors.**

5.3.2 Licensing

5.3.2.1 Situational Analysis on Licensing

According to the EACC *Ethics and Corruption Survey, 2014*,¹³⁵ bribery is the most prevalent form of corruption in the county governments. This may be attributed to bureaucracy in Government institutions and particularly in the area of licensing. Previously, the licensing regime was simplified with a single business permit allowing businessmen to conduct various business licences including transportation, trading, etc. With the coming into being of county governments, there have been introduced various licenses with numerous approvals required from various county officials. This makes it a lot more hectic and expensive to conduct business in a county.

¹³⁵Ethics and Anti-Corruption Commission, *Ethics and Corruption Survey*, (Nairobi: EACC, 2014).

5.3.2.2 Recommendations of the Task Force

The Task Force recommends, *inter alia*:-

- a) **Reduction of bureaucracy by streamlining, simplifying and reducing the licensing regimes for intra and inter county business.**
- b) **Simplify the licensing regime for purposes of reducing corrupt means of conducting business in the counties.**
- c) **Reduction of discretionary powers in the distribution of licences and permits.**

5.3.3 Public Participation, Transparency and Accountability

5.3.3.1 Legal Framework on Public Participation, Transparency and Accountability

The right to participate in governance is guaranteed under Article 10 of the Constitution of Kenya as well as under various international instruments such as Article 13 of the African Charter on Human and Peoples Rights (ACHPR),¹³⁶ Article 21 of the Universal Declaration of Human Rights (UDHR),¹³⁷ and Article 25 of the International Covenant on Civil and Political Rights (ICCPR).¹³⁸ In essence, therefore, devolution paves way for the realization of the right to participate in governance.

Under the Constitution of Kenya, public participation is required in decision-making at both levels of government. The County Government Act, 2012¹³⁹, the Cities and Urban Areas Act¹⁴⁰ and Intergovernmental Relations Act¹⁴¹ all provide mechanisms for public participation. As such management of devolved funds ought to be done in a participatory manner for in so doing, the views of citizens will be incorporated and utilized to promote development at all levels.

5.3.3.2 Situational Analysis on Public Participation, Transparency and Accountability

Public participation, integrity, transparency and accountability are some of the principles of governance provided for under Article 10 of the Constitution. There is need to have effective public participation in governance to ensure effective and efficient public service delivery that is accountable to the public. Public participation is, therefore, a continuum that ranges from providing information and building awareness to partnering in decision-making and implementation.¹⁴² Active involvement in development planning and decision-making acts as an important ingredient to transparency and accountability as it also inculcates ownership among the citizenry. Public participation also facilitates social audits which deter wastage through “white elephant” projects by corrupt public officials.¹⁴³

The new constitutional dispensation envisages Kenya as an “open society” where the citizenry can freely and easily access information. Dissemination of information and its accessibility empowers the people to make informed decisions and acts as a safeguard against corruption.

¹³⁶<http://www.achpr.org/instruments/achpr>

¹³⁷<http://www.un.org/en/documents/udhr>

¹³⁸<https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

¹³⁹The County Governments Act, 2012 (No.17 of 2012).

¹⁴⁰The Urban Areas and Cities Act, 2011 (No. 13 of 2011).

¹⁴¹The Inter-Governmental Relations Act, 2012.

¹⁴² G. Mettler & R. Baatjies, “Participatory Democracy: The duty to involve the public, the constitutional court speaks,” (2006)8(4) *Local Government Bulletin* (South Africa) (http://reference.sabinet.co.za/sa_epublication/lgbul)

¹⁴³ On public participation and leadership and integrity concerns over the devolved system of government generally, see: Republic of Kenya, *Final Report of the Task Force on Devolved Government: A Report on the Implementation of the Devolved Government in Kenya (Vol. I)*, *supra*, Chapter 5 (Structures and Institutions of Devolved Governance), pp. 62-107.

Article 35 of the Constitution guarantees the right to the public to access information in the possession of state organs. The enactment of the Access to Information Bill, 2012 should be expedited so as to give effect to this constitutional provision. As of necessity, effective public participation would require the citizenry to be well-informed.

5.3.3.3 Recommendations of the Task Force

The Task Force recommends:

- a) **The fast-tracking of the enactment of the Access to Information Bill, 2012. The Bill is intended to provide the mechanisms and procedures through which the public can access information held by state organs and the proactive dissemination of information by the state.**
- b) **Development and implementation of a public participation policy framework. The public participation policy framework should provide for the mechanisms, procedures and modalities of engagement between the public and state organs.**
- c) **The entrenchment and strengthening of social audits through the entrenchment of Civilian Oversight Committees in County Laws, and,**
- d) **Development of Citizens' Charters by all county governments.**

5.3.4 Human Resource Management

5.3.4.1 Legal Framework on Human Resource Management within the Counties

Sections 56 and 58 of the County Government Act, 2012 establish the County Public Service and County Service Boards respectively. Section 59 (1) (a) of the Act mandates the County Public Service Board (CPSB) to create and abolish county offices. It is also mandated to hire, manage and dismiss staff at the County under Section 59 thereof generally. In performing this function, the Board is supposed to adhere to the provisions of the relevant laws such as the Constitution; particularly Article 10 (on national values and principles of good governance), and 232 (on values and principles of public service), and best practices in human capital management.

5.3.4.2 Situational Analysis on Human Resource Management within the Counties

A situational analysis of the counties shows that there are emerging problems in recruitment and appointment of public officers in the counties. There are concerns of ethnicity, nepotism, clanism, favouritism, corruption, and total disregard of meritocracy in the appointment of public officers. This trend has provided loopholes for perpetuating corruption and inefficiency at the county level and there is, therefore, need for clear policy guidelines on how to address this issue.

5.3.4.3 Recommendations of the Task Force

The Task Force, therefore, recommends:

- a) **Development of standardized guidelines for establishment of offices, recruitment and deployment of personnel at the county level to ensure transparency and compliance with the constitutional requirements.**
- b) **Strengthening of County Public Service Boards to promote independence and guard against political interference.**

- c) **The on-going job evaluation by the Salaries and Remuneration Commission (SRC)¹⁴⁴ should be cascaded to the counties so as to address human resource management issues in the devolved system of government.**

5.3.5 Public Procurements and Asset Disposal

5.3.5.1 Legal framework on Public Procurements and Asset Disposal

Currently, the primary legal instrument for regulating public procurement and asset disposal is PPDA (Cap. 412a)¹⁴⁵ as read with the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011¹⁴⁶ and the Public Procurement and Disposal (County Governments) Regulations, 2013.¹⁴⁷

The Public Procurement and Disposal (County Governments) Regulations, 2013 govern procurement and disposal within the county governments while the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 cover groups or regions that have been disadvantaged over time and cannot be able to compete favourably with more-established firms hence must be given preference. The target groups include small enterprises, micro-enterprises, disadvantaged groups, citizen contractors, local contractors and citizen contractors in joint venture with foreign forms with the objective of the regulation of promoting local firms/ industries and disadvantaged groups or individuals.

5.3.5.2 Situational Analysis on Public Procurement and Asset Disposal

Article 227 of the Constitution of Kenya (on procurement of public goods and services), and the Fifth Schedule to the Constitution, require that a new law be developed to govern the procurement of public goods and services. On 26th May, 2015, Parliament debated and passed a Public Procurement and Asset Disposal (PPAD) Bill. The Bill was forwarded to the President on 27th May. The President re-submitted the Bill back to Parliament with some proposed amendments. Once enacted, the Bill will eventually repeal the current PPDA, 2005. The Task Force has identified several areas to reinforce the Bill particularly with regard to the offences proposed under Section (Clause) 177.

5.3.5.3 Recommendations of the Task Force

The Task Force recommends that:-

- a) **The National Treasury, through PPOA, should formulate clear but simplified regulations on procurement and asset disposal.**
- b) **PPOA should, where appropriate, issue guidelines as well as standard bidding documents aligned to the procurement law to ensure consistency, openness and transparency in procurement and asset disposal system.**
- c) **PPOA should build the capacity of the procurement officers, accounting officers as well key players in the public procurement and asset disposal system, including contractors.**
- d) **Adoption of automated procurement and payment processes, such as Procure-to-Pay (P-2-P) system by national and county government departments.**

¹⁴⁴ The Salaries and Remuneration Commission (SRC) is established under Article 230 of the Constitution of Kenya. Article 230(4) of the Constitution sets out the powers and functions of SRC as to, "(a) set and regularly review the remuneration and benefits of all State officers, and (b) advise the national and county governments on the remuneration and benefits of all other public officers." The Salaries and Remuneration Act, 2011 (Cap. 5G) provides further and better particulars about the work of SRC.

¹⁴⁵ Public Procurement and Disposal Act, 2005.

¹⁴⁶ The Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

¹⁴⁷ The Public Procurement and Disposal (County Governments) Regulations, 2013.

- e) **Amendment of Section 177 of the PPAD Bill, 2015 to introduce additional offences including, but not limited to:-**
 - (i) **Inappropriate disposal of assets.**
 - (ii) **Failure to have an approved Procurement Plan by the procuring entity.**
 - (iii) **Failure to comply with statutory reporting requirements to PPOA.**
 - (iv) **Varying or amending procurement or disposal contracts beyond stipulated limit.**
 - (v) **Failure to recruit competent staff (procurement professionals) to discharge the procurement function.**
 - (vi) **The wilful or negligent use of a procurement method without satisfying the conditions for its use.**
 - (vii) **Breach of the rules of specific procurements or skewed technical specifications.**
- f) **PPOA, alongside EACC, should develop and issue a Code of Ethics for Suppliers to the County Governments.**

5.3.6 Capacity Building

5.3.6.1 Situational Analysis on Capacity Building

Service delivery in county governments is hampered by inadequate structures, skilled manpower and clear frameworks to combat corruption and unethical practices. County assemblies and county Executive Committees have invariably been affected by inadequate technical capacity to carry out the oversight mandate of each other and various programmes and projects within the counties. This is a major stumbling block in the fight against corruption. It hinders a co-ordinated approach to fighting corruption at the county level.

5.3.6.2 Recommendation of the Task Force

To address this problem, the Task Force recommends:-

- a) **The development of a holistic and co-ordinated strategy for capacity-building for county executives and assemblies on policies, strategies and frameworks.**
- b) **The National Government should allocate sufficient funds for capacity-building programs on the fight against corruption.**
- c) **County governments should provide adequate budgetary allocations for capacity-building on the fight against corruption.**

5.3.7 General Service Delivery

5.3.7.1 Situational Analysis on General Service Delivery

County Governments are established to ensure equity in the distribution of resources and service delivery among counties and more so areas that had been marginalised. However, without proper checks and balances at the County level, this objective of inclusivity will not be attained mainly due to lack of uniform, equitable service delivery within the County. The need to secure government services particularly those under Part II of the Fourth Schedule to the Constitution may, therefore, lead to corruption.

5.3.7.2 Recommendations of the Task Force

The Task Force recommends:

- a) The establishment of structures and mechanisms at the County level to ensure uniform service delivery in all areas.**
- b) The publication of reports of projects undertaken in different areas of the counties for public consumption under the Right to Access Information as provided by Article 35 of the Constitution, and,**
- c) Encouragement of private sector involvement in service delivery to eradicate legal monopolies established by the County governments.**

CHAPTER SIX: PARTNERSHIPS AND COLLABORATION IN THE FIGHT AGAINST CORRUPTION

6.1 Introduction

This Chapter addresses Terms of Reference 3(e), and 3(g) of the Task Force (vide Gazette Notice No. 2118 of 30th March, 2015) which required the Task Force to “*propose appropriate mechanisms for collaboration and co-operation among the institutions involved in the fight against corruption*”, and “*consider the role of Non State Actors such as religious organisations, civil society, media, and the private sector in the fight against corruption*” respectively. In making the proposals made in this Chapter, the Task Force reviewed the relevant literature, such as: *the Draft National Ethics and Anti-Corruption Policy*¹⁴⁸, relevant statutes, international and regional anti-corruption instruments such as UNCAC,¹⁴⁹ and AUCPCC.¹⁵⁰ Memorandums received by the Task Force from different (public and private sector) organizations, previous experiences, best practices, successes and challenges faced in the fight against corruption in Kenya were also considered.

Further, in making proposals for enhancing collaborations and partnerships in the fight against corruption, the Task Force recognizes that corruption is a menace which continues to hurt and destroy the fabric of the Kenyan society. There is hardly any sector of the country which is free from the evil effects of corruption. This calls for the enhancement of partnerships and collaboration among key stakeholders in the fight against corruption and unethical conduct.

The UNCAC, under Articles 5, 12 and 13, makes a case for involvement of public, private, civil society and other sectors in the fight against corruption. Section 11 (6)(c) of EACC Act¹⁵¹ requires EACC to establish and maintain strategic linkages and partnerships with other stakeholders, including the private sector, civil society organizations, faith-based organizations and the media, amongst others. On its part, NACCSC is composed of representatives of various sectors, such as: the public; private; civil society; academia; religious organizations and the media, among others.

The examination of the subject matter (partnerships and collaborations in the fight against corruption) has been undertaken from the perspective of four thematic areas: law enforcement; public education and awareness; prevention of corruption, and the Kenya Leadership and Integrity Forum (KLIF) (which brings together all the anti-corruption stakeholders and clusters them along thematic areas for ease of cooperation and collaboration in the fight against corruption).

6.2 Highlights of the Key Issues and Proposals

6.2.1 Collaboration in Law Enforcement

Law enforcement platforms are instrumental in the fight against corruption in areas such as reporting corruption, sharing of information, intelligence and data, co-operation in investigations, prosecution, and expeditious disposal of cases. Co-operation and collaboration in law enforcement have been realized through a number of structures and forums:-

¹⁴⁸ Office of the Attorney-General and Department of Justice, *Draft National Ethics and Anti-Corruption Policy*, (Nairobi: April, 2015).

¹⁴⁹ United Nations Convention Against Corruption, (United Nations: New York, 2004).

¹⁵⁰ African Union Convention on Preventing and Combating Corruption, 2003.

¹⁵¹ The Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011).

a) National Council on Administration of Justice

The National Council on Administration of Justice (NCAJ) is established under Section 34 of the Judicial Service Act, 2011¹⁵² which sets out the composition and mandate of the Council. The Council is chaired by the Chief Justice. Members of NCAJ are drawn from: the Judiciary; the National Police Service; Attorney-General; Director of Public Prosecutions; Inspector-General of Police; Commissioner of Prisons; Chairperson of LSK; the Principal Secretaries of the ministries responsible for Public Service, Gender, Labour, Environment, and Land; the Director of the Witness Protection Agency; the Director of Probation and After-Care Services; representatives of human rights organizations dealing with women and children, and representatives of the Private sector and NGOs.

Under NCAJ, the entities deliberate on cross-cutting issues that affect the administration of justice and find solutions at the policy level.¹⁵³ This is cascaded down to the court stations through the Court Users Committees (CUCs) which deal with the same issues at the court station level. In addition, the Council makes useful contributions to the reform of laws and policies affecting the administration of justice.

b) ODPP-EACC Joint Collaboration

The ODPP and EACC Joint Collaboration was established in 2012 to look into ways of enhancing collaboration between the two offices and also to look into ways of improving investigations and prosecution of corruption and economic crime cases. It has undertaken joint trainings, joint forums, and prosecution-guided investigations. Through that initiative, *Guidelines for the Investigation of Corruption and Economic Crimes*, and *Guidelines for the Prosecution of Corruption and Economic Crimes*, have been developed and implemented by EACC and ODPP, respectively.

c) Integrated Public Complaints Referral Mechanism (IPCRM)

The Integrated Public Complaints and Referral Mechanism (IPCRM) is a joint initiative of EACC, KNCHR, National Cohesion and Integration Commission (NCIC), NACCSC, CAJ and Transparency International (TI-Kenya), whose main objective is to strengthen partnerships between the state oversight institutions in the referral, management and disposal of received complaints or reports as well as feeding back to the persons who lodge complaints. The mechanism is supported through technical assistance from GIZ.

IPCRM is aimed at enhancing access to public complaints procedures especially in rural areas beyond Nairobi. It seeks to ensure that procedures which have been put in place facilitate rather than hinder access to resolution of grievances that members of the public may have.

The IPCRM operates under the aegis of the Inter-Agency Co-ordination Committee, which consists of the policy makers and the technical team from the six member institutions. The Committee has the overall responsibility over all aspects related to the administration, implementation and functioning of the IPCRM. The policy-makers meet on a quarterly basis and the technical team meets monthly. IPCRM has proved to be an effective way of improving efficiency in the resolution of complaints and should be strengthened. In both the *Executive Summary* and the main Kenya UNCAC Country Review Report (2015) regarding Kenya's implementation of Chapter III and IV of UNCAC, IPCRM was cited by the review experts as a best practice from Kenya, which should be emulated by other countries.¹⁵⁴

¹⁵²The Judicial Service Act, 2011 (No. 1 of 2011).

¹⁵³ The establishment of NCAJ was in line with the recommendations of the Justice Ouko Task Force on Judicial Reforms of 2010. See generally: Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (Chairman: The Hon. Mr. Justice William Ouko) (Government Printer: Nairobi, July, 2010).

¹⁵⁴ See: <http://www.unodc.org/unodc/treaties/CAC/country-profile/profiles/KEN.html>

d) Financial Reporting Centre

The Financial Reporting Centre (FRC) is Kenya's Financial Intelligence Unit (FIU). FRC is established under Section 21 of POCAMLA. It is an independent body whose principal objective is to assist in the identification of proceeds of crime and to combat money laundering and to make information collected by it available to investigative and other authorities to facilitate the administration and enforcement of the laws of Kenya.

FRC contributes to the fight against corruption through the sharing of information in its possession with relevant agencies where the same relates to corruption cases. Additionally, FRC assists in the tracing of illicit financial flows (IFFs) related to corruption, and liaising with sister agencies outside the country on sharing of information related to corruption investigations. FRC has concluded MOUs with the Central Bank of Kenya, the Insurance Regulatory Authority (IRA), the Capital Markets Authority (CMA), and EACC, over matters of mutual interest.

e) Anti-Money Laundering and Combating of Financing of Terrorism (AML/CFT) Round Table Meeting

This is an interactive forum that brings together financial sector stakeholders with the aim of creating awareness on anti-money laundering (AML) issues. The Round Table meeting attracts industry leaders from both private sector and regulated bodies to discuss and debate key insights on regulatory expectations and best practices in the AML space. It also raises awareness as well as trains reporting entities, law enforcement authorities and personnel in the FRC on AML initiatives. The AML Round Table has, over the years, matured into a national forum for sharing information, developing common approaches to issues and promoting desirable policies as well as standards. Members of this meeting include: EACC; OAG&DOJ; ODPP; NIS; KRA; CBK; ARA; banks; IRA; DCI, and Mobile Money Service Providers (MMSPs).

f) MOU between EACC and PPOA

Bearing in mind that most major cases of corruption and economic crime are as a result of a flawed procurement process, there is an urgent need to have a strong working relationship between EACC and PPOA. In that regard, EACC and PPOA have prepared a Draft Memorandum of Understanding (MoU) to facilitate the collaboration of the two institutions over fighting corruption in the public procurement sector.

g) The Office of the Auditor General and EACC

The Office of the Auditor-General (sometimes referred to as Kenya National Audit Office (KENAO)), is established under Article 229 of the Constitution of Kenya. The main functions of the Officer are: to audit all accounts of the national, county, independent offices and commissions, Parliament, political parties and public debt. There is need for KENAO to work closely with ODPP and EACC to assist them to effectively investigate and prosecute those who are found culpable in their audits.

6.2.2 Collaboration in Public Education, Advocacy and Enhance Service Delivery

There has been notable collaboration in the provision of public education and advocacy against corruption and adoption of customer-focused public service programmes. This has been done through various platforms. The platforms have been instrumental in the fight against corruption in areas such as sensitization, awareness and advocacy, as well as the adoption of citizen-focused service-delivery solutions, such as Hudama Centres, and e-Citizen.

a) National Anti-Corruption Campaign Steering Committee (NACCSC)

NACCSC is established vide Kenya Gazette Notice No. 6707 of 19th September, 2014.¹⁵⁵ Its Secretariat is housed at OAG&DOJ. NACCSC was first established in 2004. Its term has, therefore, been renewed several times by H.E. the President, who is also the NACCSC patron.

NACCSC is mandated to undertake a nationwide public education, sensitization and awareness creation campaign against corruption aimed at effecting fundamental changes in the attitudes, behaviour, practices and culture of Kenyans towards corruption. The campaign is mainly targeted at the members of the public to fully empower them to deal with corruption effectively. The members of NACCSC are drawn from stakeholders relevant to the fight against corruption, such as: the Inter-Religious Council of Kenya; National Youth Council; Maendeleo Ya Wanawake Organization; National Council for Persons with Disability; EACC, OAG&DOJ, and the principal secretaries and chief executives of a number of key stakeholder MDAs. The campaign is implemented through collaboration and partnership with these member institutions.

The Chairperson of EACC is a member and this provides a vital linkage between the two institutions. Paragraph 5(b) of the NACCSC Gazette Notice obligates NACCSC to work closely with EACC. In this regard, NACCSC shares campaign implementation reports with EACC particularly those that disclose corruption cases for further action and also rally support for the anti-corruption law enforcement agencies on reporting, recording statements and adducing evidence in courts of law. Each agency participates in activities organized for the public by the other on invitation. The level of co-operation is at the policy level of both EACC and NACCSC and is, therefore, effective.

b) The Chairs' Forum

In the 2012/2013 a conference was held in Mombasa for the Chairpersons of constitutional commissions and Independent Offices. During the Conference, the members agreed to form the Chairs' Forum to deliberate on cross-cutting issues affecting their mandates. They also noted that they would use this Forum to find common positions on emerging issues in the country, such as the fight against corruption, among others. The Chairmanship is rotational and the Secretariat is offered by the Commission holding the position of the Chair.

c) Huduma Centres

Huduma Centres seek to bring together Government services under one roof for direct access and enhanced convenience for citizens, enhanced customer service, global standards for service delivery and efficiency in the turn-around times. The Presidency steers the initiative through the Ministry of Devolution and Planning (MDP).¹⁵⁶ The Centres currently process between 25 to 35 Government services under one roof. Some of these services include: issuance of Identity Cards (IDs) and birth certificates, assessments of stamp duties, registration of companies, groups and societies, National Social Security Fund (NSSF), Police clearance certificates, among others.

The initiative has provided a unique avenue for synergy and enhanced collaboration and linkages that are necessary in the fight against corruption and unethical conduct in Kenya. Some other notable results include: enhanced synergy between agencies, accelerated devolution of public services to the Counties at minimal cost, enhanced public confidence and image of the Public Service. The Huduma Centre initiative has also reduced personal contact, which has hitherto been exploited by some public officers to solicit bribes or other improper benefits.

¹⁵⁵ See: *The Kenya Gazette*, 26th September 2014.

¹⁵⁶ For more information on Huduma Kenya, visit: www.hudumakenya.go.ke.

6.2.3 Kenya Leadership and Integrity Forum (KLIF)

The Kenya Leadership and Integrity Forum (KLIF), is the successor of the Kenya Integrity Forum (KIF), which was established in 2006 following the adoption of the National Anti-Corruption Plan (NACP) by delegates. In August, 2015, NACP was replaced with a more positive-oriented Kenya Integrity Plan (KIP).

KIP is an all-inclusive anti-corruption framework with sectoral mapping on corruption and governance. It provides an opportunity for state and non-state actors to launch practical action-based initiatives that provide immediate reinforcement of anti-corruption reform efforts. It also provides a mechanism through which the stakeholders can provide input and participate in both the design and implementation of the overall Plan in individual sectoral projects and activities. It was initiated in recognition of the fact that the fight against corruption can only be won with collective and collaborative efforts. KIP has been developed to encompass the aspirations of the Kenyan people as espoused in the Constitution and the Kenya Vision 2030 and also to expand its scope to the devolved system of government. The Plan is implemented under the auspices of KLIF.

KLIF is composed of fourteen (14) sectors namely: the Legislature, Judiciary, Executive, EACC, Education, Watchdog Agencies, County Governments, Private Sector, Media, Enforcement Agencies, Professional bodies, Labour, Civil Society and Religious Sector. Recently, constitutional commissions and Independent Offices, as well as County governments, were added as stand-alone sectors under the Forum.

KLIF is a unique platform that allows a broad range of national stakeholders to leverage on their competitive advantages to contribute to the fight against corruption, creating the requisite synergy for better results with shared resources. This nature of engagement ensures that the process of decision-making and development of Action Plans complies with the principles of public participation and inclusiveness provided for under the Constitution of Kenya, 2010.

The Forum (KLIF) is structured as follows:

- a) The National Forum on Integrity which provides the policy direction in the implementation of the KIP. The President of Kenya is the Patron of the Forum.
- b) The National Co-ordinating Committee (NCC) which serves as the Steering Committee composed of the leadership of the 15 KLIF sectors. It is chaired by the Cabinet Secretary in charge of matters of ethics and anti-corruption (currently, it is the Attorney General);
- c) Sectoral Committees that plan, implement, review and report on the implementation of the KIP, their achievements, challenges and way forward;
- d) Technical Committees appointed by the NCC as need arises; and
- e) The Secretariat (currently hosted by EACC).

6.3 Challenges Affecting Co-operation and Collaboration in the Fight against Corruption

6.3.1 Legal, Policy and Institutional Challenges

In the *Draft UNCAC Country Review Report on Kenya (2015)*, the UNCAC Review Team (from Cabo Verde, Papua New Guinea, and the UNCAC Secretariat) observed that there were a number of challenges regarding the implementation of Chapter III (Criminalisation and Law Enforcement) of UNCAC. They noted that, “*Kenya has indicated that the country does not have direct legal provisions on the matter of the co-operation between national law*

enforcement authorities, as this kind of cooperation takes place by administrative channels. However, they refer to the Kenyan Integrity Forum...¹⁵⁷

A number of challenges affect inter-agency collaboration and co-operation in the fight against corruption. Some of the challenges are:-

- a) Inadequate legal or administrative framework for collaboration;
- b) Fluid membership and lack of continuity and commitment;
- c) Lack of structured work plans;
- d) Inadequate monitoring and evaluation;
- e) Inadequate resource allocation, and,
- f) Forums becoming moribund after a short life.

6.3.2 Turf Wars

The other major challenge that affects joint efforts and collaboration in the fight against corruption is protection of turfs by the various agencies. Normally, this leads to what is commonly referred to as “turf wars”, with each entity trying to protect its own turf.

Some of the reasons which give rise to turf wars are:-

- a) Overlapping mandates;
- b) Unclear roles of each member agency;
- c) High leadership turnover at the policy level;
- d) Non-committed leadership;
- e) Limited resources;
- f) Disparate capabilities to participate in the activities and programmes;
- g) Lack of prioritization of agencies on their core mandate and activities;
- h) Competition over which institution gets credit over certain results, and,
- i) Competition for publicity.

6.4 Recommendations of the Task Force

In order to enhance collaboration and co-operation in the fight against corruption, the Task Force recommends the following measures:

- a) The membership of NCAJ should be expanded to include EACC bearing in mind that corruption hinders the delivery of justice, which the Council seeks to improve.**
- b) Whereas there has been a warm working relationship between EACC and ODPP, there is need to establish a formal operational framework that facilitates the joint collaboration of the two institutions. Such a framework may include: the conclusion of an MOU, scheduled review forums, and meetings.**
- c) For IPCRM to realize its full potential and benefits there is need for commitment from the policy-makers of all the implementing institutions of IPCRM in terms of personnel and funding.**

¹⁵⁷UNODC, *Draft UNCAC Country Review Report on Kenya* (UNODC, Vienna, September, 2015) (also available at the Office of the Attorney-General and Department of Justice, Nairobi), at p. 147 (para. 487).

- d) **To ensure effective collaboration in fighting corruption through preventing and combating money laundering, there is need to strengthen co-ordination among law enforcement institutions in the investigation and prosecution of corruption cases and further strengthening of co-operation with interested agencies notably ARA, ODPP, DCI, OAG&DOJ, KRA, NRB (National Registration Bureau), and PPOA.**
- e) **Strengthen the inter-agency forum (on anti-money laundering) through capacity building support to build a strong FRC.**
- f) **Finalise and actualize the MOU between EACC and PPOA to provide mechanisms for addressing procurement-related corruption issues.**
- g) **Establish a legal framework to facilitate the transmission of Auditor-General's reports directly to EACC for timely investigations, and eventual prosecutions by the DPP. This will ensure real-time or timely onslaught against corruption.**
- h) **Strengthen the capacity of EACC and NACCSC to implement public sector education and anti-corruption campaign awareness creation for the general public respectively and build synergy between the two institutions to continue playing complementary roles.**
- i) **The Government should provide adequate resources for the conduct of civic education on the Constitution, governance, anti-corruption and national values to be undertaken by the Presidency (National Cohesion Directorate); OAG&DOJ, EACC, NACCSC and other stakeholders targeting members of the public and select groups to promote a culture of constitutionalism, rule of law, respect for human rights, adherence to national values and principles of governance, and the promotion of ethics and integrity.**
- j) **The Government should formalize and strengthen the establishment of KLIF through a statutory enactment to serve as a multi-sectoral forum for co-ordinating the fight against corruption and the promotion of ethics and integrity within and across the two levels of government (national and devolved level) and also to bring in representatives of various sectors, such as: the Executive; legislature; Judiciary; professional organizations; religious organizations; labour; education; media; law enforcement; watchdog agencies; constitutional commissions and independent offices, etc. The President could serve as the Patron of KLIF while the Chair of KLIF could be the Cabinet Secretary responsible for ethics and integrity (or the AG), and the Co-Chair should be the Chairperson of the Council of Governors. The membership of KLIF should be expanded to cover sectors that are not represented. The Secretary to the Forum should be the Secretary/Chief Executive of EACC. Countries which have such forums, such as Ghana¹⁵⁸ and South Africa¹⁵⁹ show better co-ordination and synergy in the fight against corruption.**

¹⁵⁸ Ghana has a multi-sectoral anti-corruption forum known as the Ghana Anti-Corruption Coalition (GACC). GACC is a cross-sectoral grouping of public, private and civil society organizations with the sole aim of building a national effort to confront the problem of corruption and devise effective control measures. For more details on GACC, visit: <http://www.gaccgh.org/about-gacc/background.php> (accessed on 9th July, 2015).

¹⁵⁹ South Africa has the National Anti-Corruption Forum (NACF) which seeks to combat and prevent corruption, build integrity and raise awareness. NACF was launched in South Africa in Cape Town on June 15th, 2001. The objects of NACF are to: (a) contribute towards the establishment of a national consensus through the co-ordination of sectoral strategies against corruption; (b) advise government on national initiatives on the implementation of strategies to combat corruption; (c) share information and best practice on sectoral anti-corruption work; , and (d) advise sectors on the improvement of sectoral anti-corruption strategies. NACF holds

- k) **The National Treasury should create a budget line, through EACC, for financing KLIF programmes and activities.**
- l) **The public should be actively involved in the fight against corruption. In order for them to do well in this area, the Government should organize extensive civic education programmes for the people to be made aware of anti-corruption policies, strategies and legislation in place and their role as the public. This may be done through existing institutions such as NACCSC, EACC, and OAG&DOJ.**
- m) **Professional organizations should be involved in the fight against corruption. The organizations should be advised to review their Codes of Conduct for their members and incorporate anti-corruption, ethics and integrity principles. In the same vein, there should a close working relationship between professional bodies and the three arms of Government (Executive, Parliament and the Judiciary) and the concerned public entities, such that if a person has been debarred by a professional organization, then they are not allowed to seek election or appointment or to hold a State office or public service job for as long as the debarment subsists. Indeed, Section 11(e) of LIA provides that if a State officer is a member of a professional body, he is required to observe and subscribe to the ethical and professional requirements of that body in so far as the requirements do not contravene the Constitution or LIA. EACC should invoke Section 4(2) and 11(e) of LIA to bar debarred professionals from holding State or public office.**
- n) **The Civil Society plays a very significant role in the fight against corruption. Indeed, the most unique and inherent feature of civil society is its watchdog role towards Government - for the Government cannot act against itself. Though civil society organisations (CSOs) have helped the fight against corruption war through research and dissemination of anti-corruption information, they still need to remain vigilant because other watchdog bodies like Parliament may fail. At the same time, it is important for the Government to develop a policy framework for the engagement of civil society in the fight against corruption. In the past, the Government has co-operated well with civil society, especially in terms of undertaking the review of Kenya's implementation of various international obligations arising from instruments such as UNCAC and ICCPR. Whereas this has been cited as a best practice in various forums, it is important to have a structured engagement so that the role of each actor is considered and appreciated.**
- o) **Integration of Information, Communication Technology (ICT) in the fight against corruption through the rendition of diverse Government services through ICT-based platforms, such as E-Citizen, should be supported and mainstreamed. For instance, under E-Citizen, a person can apply on-line for: a Passport; Business Name search; the registration of a business; Current and late Birth Certificate; a Death Certificate; a Marriage Certificate; Land Rent Certificate; the replacement of lost or torn Driving Licence, among other frequently-sought-after services.¹⁶⁰ EACC and other law enforcement bodies should collaborate with the managers of such networks and databases for purposes of enhanced data access and sharing, subject to the usual protocols.**

biennial summits during which various sectors report back on the implementation of various resolutions of the Forum. For more details on NACF, visit: <http://www.nacf.org.za> (accessed on 9th July, 2015).

¹⁶⁰ For more information on E-Citizen, visit: www.ecitizen.go.ke .

CHAPTER SEVEN: INSTITUTIONAL ARRANGEMENTS FOR TRAINING AND CAPACITY BUILDING

7.1 Introduction

This Chapter focuses on institutional arrangements for training and capacity building in the fight against corruption. Paragraph 3(h) of the TORs of Task Force (vide Gazette Notice No. 2118 of 30th March, 2015), required the Task Force to, “*Consider and propose appropriate institutional arrangements for training and capacity-building on anti-corruption, ethics and integrity for key anti-corruption agencies and other public officers generally*”. Training and capacity-building is a key plank in the fight against corruption. It aims at imparting the requisite skills, knowledge and attitudes on the fight against corruption. While considering the matter, the Task Force made reference to information on existing institutional arrangements for training and capacity-building as well as memorandums received from member institutions and other stakeholders. In this Chapter, a case is made for cost-effective training programmes and the establishment of an anti-corruption academy to provide specialized training on anti-corruption, ethics and integrity.

7.2 Framework for Provision of Training and Capacity Building

The Task Force noted that there is no structured national training and capacity-building programme in the fight against corruption. Most public institutions have dealt with training and capacity-building needs in this area through either on-the-job training or external training provided locally or abroad. In some cases, the training is supply-driven as opposed to being demand-driven based on the needs of various institutions. Granted that governance, anti-corruption, ethics and integrity are fairly new areas of study, there is an urgent need for better co-ordination in the development of training and capacity-programmes so that the country can effectively combat corruption and economic crime, while also promoting ethics and integrity, in a cost-effective manner.

In the case of EACC, training is offered on the job but there are also arrangements for specialized training programmes offered to individual officers or groups of officers. Training is also offered to support-services in areas such as: financial management; procurement; ICT, human resources; administration, research and policy, and fleet management.

EACC provides specialized training to its technical staff in a number of areas, such as: prevention; education; investigations; asset tracking and recovery; evidence analysis, and legal research, among other areas. The EACC training is offered at EACC offices or in external facilities locally, such as the Kenya School of Government (KSG) or KLIF offices (Nairobi). Besides on-the-job training and local training programmes, the Commission has facilitated its officers to attend some specialized training courses in Kenya and beyond.

Some of the institutions which provide some rudimentary training on governance, ethics and anti-corruption-related issues, through formal or informal programmes, are: the University of Nairobi (UoN); Kenyatta University (KU); Strathmore University (SU); Egerton University, Njoro; Jomo Kenyatta University of Agriculture and Technology (JKUAT); Masinde Muliro University of Science and Technology (MMUST); Mount Kenya University (MKU); Kenya School of Government (KSG), and Kenya Institute of Public Policy Research and Analysis (KIPPRA), among others. On its part, EACC has been offering training to other public institutions on anti-corruption, ethics and integrity issues, especially for the training of Integrity Assurance Officers (IAOs) through the Public Service Integrity Programme (PSIP). In the past, the defunct Anti-Corruption Police Unit/Kenya Anti-Corruption Commission used to run a Transparency, Research, Advocacy and Governance (TRAG) Programme in liaison with Egerton University, Njoro, which used to train public officers on good governance and anti-corruption issues.

At the regional and international levels, a number of institutions offer training in governance, anti-corruption, ethics and integrity, such as:- the International Anti-Corruption Academy (IACA)(Austria); the International Law Institute (ILI) (Uganda, and Washington); the Royal Institute of Public Administration (RIPA)(UK); L'Ecole Nationale d'Administration (L'ENA)(National School of Administration)(Paris, France); the Hong Kong University School of Professional and Continuing Education (HKU SPACE); the United Nations Asia and Far East Institute (UNAFEI)(Tokyo, Japan); the Central European University (CEU)(Budapest, Hungary); the Commonwealth African Anti-Corruption Centre (CAACC) (Gaberone, Botswana); the Anti-Corruption Academy of Nigeria (ACAN) (Kefi, Nigeria); ECOWAS Anti-Corruption Academy (Nigeria), and the East African Management Institute (ESAMI) (Arusha, Tanzania).

Besides training institutions, some limited training and capacity-building initiatives have been offered through tailor-made training programmes or on-site visits by anti-corruption experts or study visits offered through bilateral or multi-lateral institutions, such as: the Commonwealth Secretariat; the World Bank; the StAR Initiative (World Bank); the UNODC; the Independent Commission Against Corruption (ICAC) (Hong Kong); the Corrupt Practices Investigation Bureau (CPIB) (Singapore); the Independent Commission Against Corruption (ICAC)(New South Wales, Australia); and the Malaysia Anti-Corruption Academy (MACA) (Malaysia). Additionally, development agencies, such as UNDP, GIZ, and USAID have provided various forms of training to officers or institutions involved in the fight against corruption.

The Task Force noted that in some cases, both EACC and ODPP have mounted joint training programmes for investigators and prosecutors of corruption and economic crime cases. On its part, the Judiciary has no formal training for its anti-corruption special Magistrates. The effect of this is that corruption and economic crimes are treated like any other criminal offences. However, it is noteworthy that the Judiciary Training Institute (JTI) offers diverse training programmes to judicial officers, and sometimes organizes thematic seminars on anti-corruption and integrity issues. For the general Public Service, some minimal introduction to anti-corruption, ethics and integrity issues is provided during Induction Workshops or *ad hoc* workshops offered by EACC. The Task Force noted that the Kenya School of Government has developed a programme for the training of public officers on anti-corruption and integrity issues, though the programme has not been formally launched by the School.¹⁶¹

Other institutions involved in the fight against corruption do not have formal training programmes on anti-corruption, ethics and integrity. In the case of ODPP, much of the training is offered on-the-job. However, prosecutors do attend courses sponsored by ODPP locally or abroad and others provided for by development partners. Preference is given to group training. On its part, Parliament has a Centre for Parliamentary Studies and Training Institute (CPSTI), Karen, Nairobi, which could be used to provide relevant training on issues of governance and anti-corruption for Members of Parliament (MPs) and other State officers and public officers whose work falls within the ambit of Parliament.

7.3 Recommendations of the Task Force

In order to enhance the provision of training and capacity-building programmes for purposes of enhanced fight against corruption and economic crimes, the Task Force recommends the following measures:

- a) There is need for specialized training for judicial officers, prosecutors and investigators and other officials involved in the fight against corruption. The joint training of investigators and prosecutors offered by EACC and ODPP for**

¹⁶¹ Dr. Ludeki Chweya, Director General, Kenya School of Government (Nairobi) in his address to the Task Force at its 6th Meeting held at the AG's Chambers, Nairobi, on 1st September, 2015, confirmed that KSC would be offering such training to public officers.

investigators and prosecutors was cited as a best practice which should be emulated by other law enforcement agencies.

- b) OAG&DOJ, MODP, MoEST, and EACC should co-operate over the development of leadership and integrity education programmes for all levels of education, and leadership and integrity programme for public officers, in line with the provisions of Section 53 of LIA.
- c) Pursuant to the provisions of Section 53 of LIA, the Kenya School of Government (KSG) should provide training on leadership and integrity for public officers from both national and county governments. The programme should be made mandatory for promotional purposes (like the Strategic Leadership Development Programme (SLDP)) and offered through KSG¹⁶² or other accredited tertiary institutions.
- d) In line with Section 53 of LIA, and in consultation with relevant stakeholders, MoEST should facilitate the development and implementation of a leadership and integrity education programme; this should be offered throughout the education system in the country.
- e) As envisaged under Section 53(c) of LIA, OAG&DOJ, in liaison with EACC and NACCSC, and other stakeholders, should facilitate the development and implementation of a civic education programme on leadership, ethics and integrity issues targeting the general public. The programme could be modelled along the Kenya National Integrated Civic Education Programme (K-NICE), implemented by the former Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA) in liaison with a number of stakeholders from the public sector and NSAs from 2011 to 2013. Through the K-NICE programme members of the public and institutions were sensitized about the new Constitution of Kenya, 2010 and that helped many people appreciate the meaning of the new Constitution and their responsibility towards it and ensuring its implementation.
- f) The Judiciary (through the Judiciary Training Institute (JTI)) should, in consultation with EACC, OAG&DOJ, Kenya School of Government, and other stakeholders, develop and mount regular courses and seminars on leadership, anti-corruption, ethics, and integrity for judicial officers and staff, especially the judges and Special magistrates who handle corruption and economic crime matters.
- g) Parliament (through the Centre for Parliamentary Studies and Training Institute (CPSTI)), should, in consultation with EACC, OAG&DOJ, Kenya School of Government and other stakeholders, develop and mount regular courses and seminars on leadership, anti-corruption, ethics and integrity for Members of Parliament, Parliamentary staff and Parliamentary Committees responsible for anti-corruption, ethics and integrity issues.
- h) EACC, in consultation with OAG&DOJ, ODPP and other stakeholders, should oversee the establishment of a National Anti-Corruption Academy (NACA) to provide specialised training to officers involved in the fight against corruption.
- i) OAG&DOJ and the Ministry of Foreign Affairs and International Trade (MFAIT) should work towards facilitating Kenya's ratification of the *Instrument Establishing the International Anti-Corruption Academy*. The International Anti-

¹⁶² For details on the programmes offered by Kenya School of Government (KSG), visit: www.ksg.ac.ke

Corruption Academy (IACA), based in Laxenburg, Austria offers specialized training and regular anti-corruption courses which Kenyan anti-corruption officials, prosecutors, judicial officers and OAG&DOJ staff could benefit from. Kenya was one of the founder members of the Academy, having signed the instrument in September, 2010.¹⁶³ By becoming a Party to the IACA Instrument, Kenya would easily make a case for hosting a regional campus for IACA.¹⁶⁴ The establishment of such an academy would also be in line with the provisions of Section 53 of LIA which calls for the provision of organized training on leadership and integrity, anti-corruption and ethics to anti-corruption agencies, the public service and other stakeholders, nationally, regionally and beyond.

- j) Mainstream anti-corruption, ethics and integrity training in to the formal system of education at Early Childhood Development (ECD), primary, secondary, tertiary and university levels. Training in this area could be offered as stand-alone subjects or incorporated into existing curriculums, e.g. Civics or Social Education and Ethics. It will be recalled that while recommending that Social Education and Ethics should be taught to students throughout the educational system, the Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond¹⁶⁵ noted that the inculcation, through education, of social ethics in the lives of individuals is important both to the individual and the integrity of the nation.¹⁶⁶
- k) The Government should allocate adequate resources for anti-corruption, ethics and integrity training in all anti-corruption institutions, KSG and other training institutions.
- l) Establish partnerships and collaborations on training and capacity-development on anti-corruption, ethics and integrity, with international and regional anti-corruption training programmes such as IACA (Austria), and the Commonwealth African Anti-Corruption Centre (CAACC)(Botswana).
- m) Formulate and implement county government specific anti-corruption, ethics and integrity training programmes.
- n) Induction Programmes for State Officers and Public Officers should incorporate training on anti-corruption, ethics and integrity. Thus, there is a case for the revision of the *Handbook for Civil Service Staff Induction*¹⁶⁷ to incorporate some aspects of anti-corruption, ethics and integrity and also general aspects of the Constitution of Kenya, 2010.
- o) EACC should initiate consultations with the Ministry of Devolution and Planning, OAG&DOJ, the Kenya School of Government and other stakeholders, with a view to reviving the Public Service Integrity Programme (PSIP) through which Integrity Assurance Officers (IAOs) and public officers generally may be trained on anti-corruption, ethics and integrity strategies. In the same vein, the PSIP sourcebook (*A Sourcebook for Corruption Prevention in the Public Service*)¹⁶⁸

¹⁶³ For more information on IACA, visit: www.iaca.int

¹⁶⁴ Cf. The Malaysia Anti-Corruption Academy (MACA) has an arrangement with IACA, for some of the IACA Master Anti-Corruption Studies (MACS) modules to be offered at MACA, in Kuala Lumpur, Malaysia.

¹⁶⁵ Republic of Kenya, *Report of the Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond* (Chairman: James M. Kamunge) (Nairobi: Government Printer, March, 1988).

¹⁶⁶ *Ibid*, p.14, Para. 3.9.

¹⁶⁷ Republic of Kenya, *Handbook for Civil Service Staff Induction* (Nairobi: Office of the President, 2006).

¹⁶⁸ See: Republic of Kenya, *A Sourcebook for Corruption Prevention in the Public Service* (Nairobi: Directorate of Personnel Management and Kenya Anti-Corruption Commission, 2011).

should be revised to keep in step with modern trends and demands in the fight against corruption and the promotion of ethics and integrity.

- p) MoEST, Kenya Institute of Curriculum Development (KICD), and the Commission for University Education (CUE) should facilitate the development of diploma and degree programmes on governance, anti-corruption, ethics and integrity to train skilled manpower in this novel area, and,**
- q) The Government should strengthen the capacity of public institutions to develop sound policies, which have internal good governance and anti-corruption provisions, as condition precedent to the development of new laws or implementation of projects funded from public funds.**

CHAPTER EIGHT: TECHNICAL ASSISTANCE

8.1 Introduction

This Chapter addresses the issue of Technical Assistance (TA). Paragraph 3(j) of Terms of Reference of the Task Force required the Task Force to “*consider proposals for technical assistance for the institutions involved in preventing and combating corruption*”. In making the proposals made in this Chapter, the Task Force reviewed some relevant literature, such as various regional and international instruments, viz, UNCAC,¹⁶⁹ and the AU Convention on Preventing and Combating Corruption.¹⁷⁰ In addition, the Task Force considered the *Draft UNCAC Country Review Report of Kenya*¹⁷¹ on the implementation of UNCAC Chapter III (Criminalisation and Law Enforcement), and Chapter IV (International Co-operation).

The Task Force recognises that corruption is a multi-dimensional problem which must be addressed using cross-cutting approaches of strong inter-agency collaboration and linkages and TA. For this to be achieved there is need to strengthen provision of TA for the institutions involved in preventing and combating corruption. This should be in line with the domestic needs of the country. Further, it is in line with the provisions of Article 60 of UNCAC, which calls for training and TA support for anti-corruption bodies to ensure that they have the requisite capacity to prevent and combat corruption.

In the past, Kenyan anti-corruption bodies have received TA from multi-lateral and bilateral partners, such as: the World Bank; UNODC; GIZ; United Nations Development Programme (UNDP), United States Agency for International Development (USAID), and the Department for International Development (DFID) (UK), among others. The support has been in the form of training or provision of technical equipment or consultancy services over some technical areas. The support has been provided either directly or through indirect means, such as through a basket fund like Governance, Justice, Law and Order Sector (GJLOS) reform programme.

The UNCAC training and TA framework focus on:

- a) Prevention, detection, investigation, punishment and control of corruption including evidence gathering and investigative methods;
- b) Capacity building for development and planning of strategic anti-corruption policy;
- c) Training on preparation of mutual legal assistance;
- d) Evaluation and strengthening of institutions, public service management, public financial management, public procurement and the private;
- e) Preventing and combating transfer of proceeds of corruption and economic crime;
- f) Detection and freezing of the transfer of proceeds of corruption and economic crime;
- g) Surveillance of the movements of the proceeds of corruption and economic crime;
- h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of corruption and economic crime;
- i) Methods for protecting victims and witnesses who cooperate with judicial authorities, and,
- j) Training in national and international regulations and languages.

¹⁶⁹ United Nations Convention Against Corruption, (New York: United Nations, 2004)

¹⁷⁰ African Union Convention on Preventing and Combating Corruption, 2003.

¹⁷¹ UN Office on Drugs and Crime, *Draft UNCAC Country Review Report of Kenya* (Vienna: September, 2015).

It is expected that State Parties to UNCAC will be according each other TA in the areas mentioned above especially for the benefit of developing countries. In addition, they are expected to strengthen efforts to maximize operational and training activities in regional and international organizations.

8.2 Highlights of the Proposal for increased Technical Assistance

8.2.1 Technical Assistance to Anti-Corruption Institutions

TA should focus on enhancing technical capacity to handle complex issues across jurisdictions and acquisition of modern technical equipment such as setting up a forensic laboratory and other investigative facilities.

8.2.2 Recommendations of the Task Force

Having considered the potential benefits of TA to the fight against corruption, the Task Force makes the following recommendations regarding TA provision:-

- a) Identifying experts in various fields related to investigation, enforcement and prevention of corruption and unethical conduct.**
- b) Provision of continuous training and development on skills and techniques in the investigation and prevention of corruption, economic crime and unethical conduct.**
- c) Facilitate the establishment of a forensic laboratory for EACC and acquisition of modern investigation tools and equipment.**
- d) TA should be need-driven rather than supply-driven.**
- e) While TA may be offered to individual organizations it is recommended that a ‘basket-fund’ approach be adopted to ensure appropriate sectoral planning and implementation of anti-corruption programmes is encouraged. This approach has been used before, with significant success, through the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme.¹⁷²**
- f) There should be TA support towards carrying out monitoring and evaluation (M & E) of the impact of various anti-corruption measures. Granted that the country has had so many anti-corruption initiatives for several decades, it is important that M&E be carried out regularly to appreciate the successes or weakness of the system, and propose appropriate remedial measures.**

8.2.3 Technical Assistance within the framework for Criminalization, Law Enforcement and International Co-operation

During the review of Kenya’s implementation of Articles 15-42 (Chapter III on “Criminalisation and Law Enforcement”) and Articles 44 – 50 (Chapter IV on “International Cooperation”) of UNCAC for the first UNCAC review cycle 2010-2015, a number of recommendations were made for TA. While the implementation of other Chapters of UNCAC, such as Preventive Measures (Chapter II) and Asset Recovery (V), is yet to be undertaken, it is noteworthy that the implementation of TA needs under Chapters III and IV of UNCAC will simultaneously address most of the challenges faced by anti-corruption bodies in the fight against corruption in Kenya. Nonetheless, the forthcoming review of both Chapters II

¹⁷² The GJLOS Reform Programme was started in 2013 under the former Ministry of Justice and Constitutional Affairs (MOJCA) and has since 2013 been under the aegis of the Office of the Attorney General and Department of Justice (OAG&DOJ).

and V of UNCAC is expected to reveal more TA needs for various anti-corruption bodies in Kenya.¹⁷³

8.2.4 Recommendations of the Task Force

In line with the recommendations of the *Draft UNCAC Country Review Report of Kenya (2015)*, and following consultations with the key institutions involved in the fight against corruption, especially EACC, ODPP, the Judiciary, OAG & DOJ, PPOA, FRC, DCI, NACCSC, and the Auditor-General, among others, the Task Force identified the following areas for TA:-

- a) Article 20 of UNCAC (Illicit enrichment)**
 - (i). Legal advice**
 - (ii). On-site assistance by an anti-corruption expert**
- b) Article 21 of UNCAC (Bribery in the private sector)**
 - (i). Summary of good practices/lessons learnt**
 - (ii). There is need for benchmarking to identify strategies of tackling private – private corruption and sensitizing the public.**
- c) Article 22 of UNCAC (Embezzlement of property in the private sector)**
 - (i). On-site assistance by an anti-corruption expert**
 - (ii). Training of judiciary staff (judges and magistrates through the Judiciary Training Institute (JTI)).**
- d) Article 23 of UNCAC (Laundering of proceeds of crime)**
 - (i). Legal advice**
 - (ii). On-site assistance by an anti-corruption expert**
 - (iii). Full operationalization and capacity building of the recently established Financial Reporting Centre and establishment of the Asset Recovery Agency.**
- e) Article 32 (5) of UNCAC (Protection of witnesses, experts and victims)**
 - (i). Summary of good practices/ lessons learnt.**
 - (ii). Capacity-building programmes for authorities responsible for establishing and managing witness and expert protection programmes.**
 - (iii). On-site assistance by a relevant expert.**
 - (iv). Capacity-building programmes for authorities responsible for establishing and managing witness, expert and victim protection programmes.**
- f) Article 37 (5) of UNCAC (Co-operation with law enforcement authorities)**
 - (i). On-site assistance by a relevant expert**
- g) Article 38 of UNCAC (Cooperation between National Authorities)**
 - (i). On-site assistance by a relevant expert: There is need for training on surveillance of the movement of the proceeds of crimes established in accordance with the Convention and the methods used to transfer, conceal,**

¹⁷³ The review of the implementation of Chapter II and V of UNCAC is expected to start in 2015/2015, once the UNCAC Implementation Review Group adopts the calendar of the next review cycle of UNCAC implementation. For more information on the UNCAC Review Mechanism, visit: www.undoc.org.

or disguise such proceeds. The evaluation and strengthening of institutions like the Financial Reporting Centre is also necessary.

- (ii). An on-site expert would be necessary.
- h) Article 39(2) of UNCAC (Co-operation between National Authorities and the private sector)
 - (i). On-site assistance by a relevant expert
 - (ii). Capacity-building programmes for authorities responsible for regulating matters related to the private sector
 - (iii). Capacity-building programmes for authorities responsible for the establishment and management of reporting programmes and mechanisms.
- i) Article 45 of UNCAC (Transfer of sentenced persons)
 - (i). On-site assistance by a relevant expert on implementation of the requirements of the Article.
- j) Article 46 (30) of UNCAC (Mutual Legal Assistance(MLA))
 - (i). *Summary of good practices/lessons learnt: Benchmarking with best practices from other countries, especially in the Commonwealth.*
 - (ii). *On-site assistance by an anti-corruption expert: To assist the relevant bodies deal with the challenges faced in processing MLA requests.*
 - (iii). *Capacity-building programmes for authorities responsible for international co-operation in criminal matters: Training of institutions/officers involved in the processing of MLA requests.*
 - (iv). *Development of an action plan for implementation: To ensure that MLA requests are processed expeditiously and all the concerned bodies play their respective roles in a timely manner.*
- k) Article 47 of UNCAC (Transfer of criminal proceedings)
 - (i). *Summary of good practices/lessons learnt: For the sharing of best practices on the transfer of criminal proceedings.*
 - (ii). *Legal advice: On the development of transfer of criminal proceedings legislation, including the management of such a scheme.*
 - (iii). *On-site assistance by an anti-corruption expert: To develop transfer of criminal proceedings legislation.*
 - (iv). *Capacity-building programmes for authorities responsible for international cooperation in criminal matters: For the training of institutions/personnel responsible for international cooperation in criminal matters.*
 - (v). *Development of an action plan for implementation: To guide the country towards the development of transfer of criminal proceedings legislation and the development of a framework for the implementation of such legislation.*
- l) Article 48 of UNCAC (Law enforcement co-operation)
 - (i). Summary of good practices/lessons learnt;
 - (ii). TA (establishment and management of databases/information-sharing systems);

- (iii). On-site assistance by a relevant expert;**
 - (iv). Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation;**
 - (v). Development of an action plan for implementation; and**
 - (vi). Model agreement(s)/arrangement (s).**
- m) Article 50 of UNCAC (Special investigative techniques)**
- (i). Summary of good practices/lessons learnt;**
 - (ii). On-site assistance by a relevant expert;**
 - (iii). Capacity-building programmes for authorities responsible for designing and managing the use of special investigative techniques;**
 - (iv). Development of an action plan for implementation;**
 - (v). Legal advice;**
 - (vi). Model agreements/arrangements, and,**
 - (vii). Capacity-building programmes for authorities responsible for international cooperation in criminal/ investigative matters.**

CHAPTER NINE: PROPOSED LEGISLATIVE INTERVENTIONS

9.1 Introduction

Under paragraph 3(c) of the TORs of the Task Force, the Task Force was tasked to “*propose appropriate amendments to various legal instruments with a view to strengthening the legal and institutional framework for fighting corruption*”. Further, paragraph 3(i) required the Task Force to “*identify international and regional best practices in the fight against corruption*”. In the preceding Chapters of this Report, a number of areas which require legislative interventions aimed at strengthening the existing anti-corruption legal and institutional framework have been identified. The proposed interventions target the current policy, legal and institutional framework, and seek to entrench the proposed strategies in the fight against corruption.

In line with the TORs of the Task Force quoted above, the proposed legislative interventions are categorized in three broad, but inter-related, areas. First, there are proposals focusing on desired amendments to existing statutes. An overview on the various proposed amendments, statute by statute, is provided in this Chapter. Secondly, proposals have been made on either fast-tracking the enactment of relevant Bills pending in Parliament; as well as relooking into and reviewing the provisions of some of the existing Bills. Lastly, proposals have been made for enactment of new laws to bring on board innovative strategies which have worked well in other jurisdictions in terms of enhancing the fight against corruption. A compendium of proposed legislative amendments is attached to this Report as **Appendix I**.

9.2 Proposed Amendments to Existing Laws

To implement the recommendations made, existing core and complementary statutes in the fight against corruption need to be amended. The following is a brief overview of the proposed amendments:

9.2.1 Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)

This Act principally provides for the establishment of EACC, its functions and powers, and procedures for nomination and appointment of Commissioners (Members), Secretary and staff. Among the key proposals are provisions to:

- a) Alter the current structure of EACC in order to facilitate the delivery of its mandate. This has been done by increasing the number of Commissioners from the current three to five (including the Chairperson), and changing their terms of service from full-time to part-time, and converting the designation of the Secretary/Chief Executive of the Commission to Director-General (DG), in line with prevailing practice, and further, through enhancing the security of tenure of the DG in the performance of the duties assigned to the office;
- b) Expand and strengthen the mandate and powers of EACC in line with other proposals in this Report;
- c) Enhance inter-agency collaboration in the fight against corruption;
- d) Ensure that all functions and powers necessary for the execution of the EACC’s mandate are provided for.

9.2.2 Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)

This Act provides for the investigation, prosecution, adjudication and punishment for corruption and economic crime offences. The proposed amendments address the following areas:-

- a) Expand the definition of key terms, such as “associate” and “public body” in order to bring into the ambit of operation of the Act several classes of associates of suspects and public bodies partly-funded by the Exchequer.
- b) Ensure that there is a structure for the performance of functions previously undertaken by the defunct KACC within the structure of the EACC.
- c) Make provisions for expediting the determination of corruption and economic crime cases.
- d) Strengthen the legal framework for the investigation of corruption, economic crime and ethical breaches.
- e) Strengthen the legal framework for the recovery of proceeds of corruption and economic crimes as well as unexplained wealth.
- f) Encourage settlement of deserving cases through other Alternative Dispute Resolution (ADR) mechanisms, including disclosure for amnesty, restitution and plea bargains.
- g) Expand the scope of offences to include private sector corruption.
- h) Criminalize acts of corruption which have not been criminalized in line with requirements of regional and international anti-corruption instruments to which Kenya is a party, such as UNCAC, and AUCPCC. The acts envisaged include *inter-alia*; trading in influence, abuse of position, bribery in the private sector, laundering the proceeds of corruption/economic crime and illicit enrichment.
- i) Expand the scope of some of the offences provided for in the Act, especially in Section 45 to cover various aspects of criminality such as breach of procurement procedures for provision of “works” over and above the issue of supply of goods and services.
- j) Enhance the penalties for corruption, economic crimes and related offences.
- k) Introduce additional passive corruption offences including wilful neglect, failure to report breach of process, etc.

9.2.3 Leadership and Integrity Act, 2012 (No. 19 of 2012) (LIA)

LIA was enacted pursuant to the requirements of Article 80 of the Constitution, to provide for procedures and mechanisms for effective implementation of Chapter Six of the Constitution (on Leadership and Integrity). There is a general consensus that the current statute, as it is, falls short of the threshold expected in terms of providing an effective legal framework for realization of the leadership and integrity requirements.

The proposed amendments seek to, among other things, strengthen the framework for enforcement of the requirements under the Constitution on leadership and integrity. The Act has not adequately criminalized infractions to the Leadership and Integrity Code as envisaged in the Constitution. Further, the Act has not clearly provided for sanctions which a State officer or a Public officer may be exposed to, or the procedures of invoking the same once it is proved that a State officer or Public officer has violated the various requirements of the Code. The amendments also seek to harmonize LIA with other related laws such as POEA. A proposal is also made for the establishment of an Ethics Tribunal to adjudicate over ethical breaches.

9.2.4 Public Officer Ethics Act, 2003 (No. 4 of 2003) (POEA)

POEA was enacted in 2003 to provide for ethics of public officers, including making provision for financial declarations. However, there have been significant developments in the law that necessitate the review of the Act in order to harmonize its application in the present constitutional and legal environment. Notably, the scope of “public officer” in the Act has

changed in line with the new Constitution, which has created a distinction between a Public officer and a State officer. Secondly, the current constitutional and legal framework has established offices which were not provided for in the Act. These include Constitutional Commissions and Independent Offices, as well as some offices under the devolved system of government. For some of these offices, responsible Commissions have not been provided for; for purposes of enforcing ethical requirements and managing financial declarations. The proposals made also seek to strengthen the regime for management of financial declarations so that they become a more effective tool in checking illicit enrichment by State Officers and Public officers.

9.2.5 Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA)

POCAMLA establishes a strong legal framework for dealing with proceeds derived from all crimes including corruption, as well as combating the laundering of such proceeds. However, the framework excludes the EACC which is the principal agency mandated to prevent and combat corruption with respect to proceeds derived from corruption and economic crime. Secondly, the Asset Recovery Agency (ARA) established under the Act has been empowered to undertake asset recovery in respect of corruptly-acquired assets, a function which is also bestowed on the EACC. It is, therefore, necessary to harmonize co-operation mechanisms between the two institutions where their jurisdictions overlap. The proposed amendments to the Act seek to address such concerns, among other issues.

9.2.6 Mutual Legal Assistance Act, 2011 (No. 36 of 2011) (MLA Act)

The MLA was enacted to regulate and facilitate the processing of incoming or outgoing requests for assistance. It establishes the Office of the Attorney-General as the Central Authority, through which requests by or to competent authorities are channelled. The proposals in respect of this Act seek to recognize the primacy of negotiated treaties, whether bilateral or multilateral, as authoritative texts for the process of facilitating such requests. Treaties are also recognised as instruments that can bridge gaps where provisions in the law are deemed inadequate.

To inject greater efficiency and effectiveness in international co-operation, the proposed amendments also provide the necessary legal underpinning for co-operation among competent authorities and their counterparts in foreign jurisdictions. Another important proposal is to recognize “prosecutorial judicial authority established by law” as a mainstream competent authority. It is also aimed at making clear the interpretation of some of the provisions in the Act, which may be amenable to different interpretations.

9.2.7 Commission on Administrative Justice Act, 2011(No. 23 of 2011) (CAJ Act)

This Act establishes the Commission on Administrative Justice (CAJ) (commonly referred to as “the Office of the Ombudsman”). It is established as a successor to the Public Complaints Standing Committee (PCSC), and its principal function is to conduct investigations into complaints of abuse of powers by public officers or bodies, and make appropriate recommendations thereon. Article 47 of the Constitution guarantees the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The enforcement of this right complements and boosts the fight against corruption.

There are several proposed amendments to the CAJ Act, which seek to, *inter-alia*;

- a) Expand the definition and scope of “fair administrative action” in line with constitutional provisions in Article 47;
- b) Expand the scope of sanctions which can be recommended against a Public officer who is proved to have violated the right to fair administrative action;

- c) Establish an enforcement mechanism for implementation of the recommendations made by the Commission, including timelines for compliance.

9.2.8 Evidence Act (Cap. 80)

The proposals contained in this Report may have consequential effects on various procedural laws such as the Evidence Act, which necessitates an overhaul of some of the provisions so as to align and harmonize their application. This notwithstanding, the review of procedural legislation such as the Evidence Act should not be done in isolation of recommendations from one sector. It is understood that other sectors may have their own recommendations which should be looked at holistically and considered as a whole.

9.2.9 The Elections Act, 2011

It is recommended that Section 22(1) of the Elections Act, 2011 be amended to provide for the application of the Leadership and Integrity Act, 2012, as one of the laws to be employed in the determination of the eligibility of persons seeking election to a public office.

9.2.10 Government Contracts Act (Cap. 25)

It is recommended that the Government Contracts Act be amended to provide for a new paragraph 4A, whose effect is to render null and void any Government contract obtained through corrupt conduct and absolve the Government from any liability in case a contract was obtained through corrupt acts. This is meant to sound a warning to contractors not to bribe public officials.

9.3 Recommendation of the Task Force

The Task Force recommends a well-co-ordinated review of various procedural and substantive laws that impact the criminal justice system generally.

Thus, ODPP should spearhead the review exercise, in recognition of its central role in coordinating the prosecution of cases from different law enforcement agencies covering all crimes recognized by law. The review should also extend to other related pieces of legislation, such as the Evidence Act (Cap. 82), the Criminal Procedure Code (Cap. 75), and the Penal Code (Cap. 63).

9.4 Review of Pending Bills

In the past efforts to address some of the challenges faced by institutions which play key roles in the fight against corruption, a number of legislative reviews have been made or attempted, and some of them are pending in Parliament (as Parliamentary Bills). The Task Force identified and reviewed some of those Bills with a view to making appropriate recommendations based on their likely impact on the war on corruption.

Some of those Bills are:-

9.4.1 Public Audit (Amendment) Bill, 2014

This Bill seeks to overhaul the Public Audit Act, which provides the framework of operation for the Office of the Auditor General, an independent office established under Article 229 of the Constitution. It is mandated to audit and report, at the end of every financial year, the accounts of the national and county governments, all courts, every Commission and Independent Office, Parliament and County Assemblies, and political parties funded from public coffers. In the process of conducting such audits, the Office often establishes cases of fraud or corruption. The Office is, therefore, a key stakeholder in the fight against corruption and economic crime. The proposed amendments to the Bill seek to make it possible for the Office to share, in a timely manner, information on suspected fraud or corruption with other law enforcement authorities.

9.4.2 Controller of Budget Bill, 2015

The Office of the Controller of Budget is established under Article 228 of the Constitution, to oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from the public funds such as the Consolidated Fund, Contingencies Fund and the Equalisation Fund. Just like the Auditor General, this is an important undertaking in terms of combating corruption as the main target of the corrupt individuals is the public purse from whose coffers the withdrawals have to be approved by the Office. Other than the Constitutional provisions which lay the general legal framework, and the Independent Offices (Appointment) Act, 2011, which regulate the procedures for the recruitment of the Auditor General, and the Controller of Budget, there has not been any law which regulates the performance of the duties of the Office of the Controller of Budget.

A Bill has now been developed to address this aspect, and it is pending in Parliament. Under Clause 7 of the Bill, the Controller of Budget is empowered to prepare and submit a Special Report to any state agency as may be appropriate pursuant to an investigation the Office has conducted pursuant to Article 252(1) (a) of the Constitution. This presupposes that the Office can share information, in the form of a report, on matters such as suspected fraud or corruption it has established in any of the public bodies whose budgets it is monitoring. Though this is a laudable provision in terms of fighting corruption, it suffers a limitation to the effect that such information must be preceded by an investigation.

A proposal is made that this provision should be reviewed to enable the Controller of Budget to share such information when it is reasonably suspected, instead of waiting until an investigation is conducted as this may take time. This would also reduce the chance of duplicated investigation since the state agency with whom the information is shared may also be required to initiate an investigation into the matter. In general, the Bill should also be reviewed to enable the Controller of Budget to share information with other relevant oversight bodies on the efficiency of implementation of specific projects by public entities, so that wastage and other imprudent use of public funds can be dealt with in a timely manner.

9.4.3 Public Procurement and Assets Disposal (Amendment) Bill, 2015

Public procurement accounts for over 70% of the National Gross Domestic Product (GDP). Notably, it has been established through various surveys that almost 80% of all corruption in the country is procurement-related. The Public Procurement Oversight Authority (PPOA) is the national agency dedicated to regulation and oversight of public procurement. PPOA is established pursuant to the Public Procurement and Disposal Act, 2005 (PPDA). The PPDA, together with the PPDA Regulations of 2006, and Procurement Guidelines issued from time to time by PPOA, constitute the main legal regulatory framework for public procurement and disposal in the country.

Article 227 of the Constitution sets the constitutional basis of oversight over public procurement and disposal of goods and services in the public sector. PPOA has been overseeing the review of the regulatory framework in the country annually, as it is mandated to do so under the law. Various legislative interventions have thus been undertaken on the law. However, in 2014, the Public Procurement and Assets Disposal (Amendment) Bill was developed, which seeks to review and overhaul the entire PPDA.

From experience, some of the critical areas which the country must ensure have been well-addressed through the Bill include the following:-

- (a) The issue of capacity constraints within PPOA.
- (b) PPOA must be enabled to enforce discovery of documents from procuring entities when they are the subject of inquiry or investigation.

- (c) To grant operative immunity to the Public Procurement Administrative Review Board (PPARB), for decisions made in good faith.
- (d) Extension of debarment sanction to the individual owners or directors of companies found to have engaged in procurement irregularities.
- (e) The law must ensure public entities adopt the e-procurement platform, as a corruption reduction strategy in public procurement and disposal.
- (f) Handling procurement in corruption-prone areas, such as: mega-projects; security; extractive industries; and emergency operations (such as during emergencies or national disasters), among others.
- (g) Provide for consumer rights to quality goods and services, as per Article 46 of the Constitution, and address procurement complexities involving disadvantaged groups.

Further, some additional amendments are proposed to the Public Procurement and Asset Disposal (Amendment) Bill, 2015, as follows:-

- a) To provide for a Code of Conduct and Ethics (in the Schedule to the Act) to be signed by all suppliers of goods and services to government MDAs; committing themselves to uphold integrity in the procurement process.
- b) Provide capacity-building of persons involved in public procurement as a function of the Authority to enhance corruption prevention.
- c) A clause be inserted in all contracts entered into by public entities to the effect that if it is discovered that the contractor bribed a public official or offered any form of benefit before, during or after the conclusion of the contract, the contract shall be rendered null and void and that the Government shall be under no obligation to honour any term or condition in the contract, and further, the Government, through EACC, shall initiate proceedings towards the recovery of any benefit so obtained. In the case of *World Duty Free Company Ltd. v. The Republic of Kenya*¹⁷⁴ of 2006, the Claimant lost his case before the International Centre for Settlement of Investment Disputes (ICSID) tribunal, when evidence was adduced to the effect that he had bribed public officials in Kenya so as to secure some business in Kenya.
- d) An amendment to include additional offences:
 - (i). Inappropriate disposal of assets
 - (ii). Failure to have an approved procurement plan by a procuring entity
 - (iii). Failure to comply with reporting requirements to the Authority
 - (iv). Varying or amending procurement contracts beyond stipulated limit
 - (v). Failure to staff a procurement unit with procurement professionals.
 - (vi). Wilful negligent use of a procurement method without satisfying conditions set forth for the method, and,
 - (vii). Failure to submit documents required by the Authority.

9.4.4 High Court Organisation and Administration Bill, 2015

It is proposed that the High Court Organisation and Administration Bill, 2015 be amended to provide for the establishment of an Anti-Corruption and Economic Crimes Division of the

¹⁷⁴*World Duty Free Company Ltd. v. The Republic of Kenya* ((ICSID Case No. ARB/00/7), Washington DC, USA, 4 October, 2006).

High Court. The Division will be trying complex corruption and economic crimes, serious fraud and money-laundering cases, including recovery of proceeds of those crimes.

9.5 Proposals for Enactment of New Laws

The Task Force has studied the regional and international best practices on combating and preventing corruption, and has identified several areas which Kenya is yet to make inroads into; and recommends that it is high time that the country adopts such practice to boost the war against corruption. Some of these areas, such as whistle-blower protection and freedom of information, may not be new concepts in the country. A number of attempts have been made in the past to enact laws to address those areas but to-date, the laws are not yet in place.

9.5.1 *Qui Tam* Laws or Provisions

The country should consider, among other strategies, enactment of a statute (or embedded in existing laws) legal provisions that rewards whistle blowers whose reports result to recovery of public funds or assets as well as providing a framework for *qui tam actions* whereby recovery suits are instituted by private persons for the state with a portion of recovered damages being awarded to the plaintiff as incentive. *Qui tam* laws would encourage private sector participation in scrutiny and oversight of public spending. The incentive provided makes implementation of such law practical and sustainable without additional institutions or costs to the State.

Qui tam in the common law legal system is a writ that allows a private individual to have a share of the penalty imposed on account of assisting in the prosecution of the wrong doing. *Qui tam* is the short form of the longer Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* more loosely translated to mean “he who brings a case on behalf of our lord the King as well as for himself.” In the United States, *qui tam* provisions were promulgated under the False Claims Act, 31 USC No. 3729 (also known as the Lincoln Law). The law was passed by the Congress in 1863 during the tenure of Abraham Lincoln as President of the United States. The initial drive was to recover illicit gains from contractors who supplied decrepit war related supplies to the Government of the United States during the American Civil War (12th April, 1861–9th April, 1865).

Under the False Claims Act, a private citizen (not a public or state servant) is permitted to bring a claim against contractors for fraudulent claims against the State. If the claim succeeds, the plaintiff stands to receive a portion of between 15-25 per cent of the recovered damages. Regionally, Rwanda has introduced a rudimentary form of *qui tam* provisions in its laws. Its Anti-Corruption Law No. 23 of 2003, in Article 37, states that “*The court will preserve a bonus for whoever will have contributed to the denunciation of offences provided by this law without participating in the commission of these offences*”.

Qui tam actions have become very successful in countries such as USA, where numerous actions have been instituted by private citizens for recovery of illicit wealth and losses suffered by government as a result of fraud or corruption by public officers. It is high time that such a concept was introduced in Kenya. Areas of criminality which can be effectively combated by such provisions include:-

- a) Tax evasion;
- b) Illicit wealth not declared through financial disclosures;
- c) Embezzled public funds;
- d) Procurement irregularities;
- e) Illegal payments (such as allowances), and,
- f) Poorly-implemented public projects.

9.5.2 Freedom of Information

An effective war on corruption presupposes a situation where there are appropriate mechanisms to facilitate access to public information by the citizens. This encourages public participation in governance processes, and aids in qualitative information sharing by the citizens, including the media, civil society and the public at large. Article 35 of the Constitution lays the foundation; providing that every citizen has the right of access to information held by the State; or information held by any other person and required for the exercise or protection of any right or fundamental freedom.

It behoves the Government to spearhead the enactment of legislation to facilitate the exercise of the right of access to information, which can greatly boost the war on corruption. Previous attempts have been made in this respect but we are yet to have a law on this aspect. The Access to Information Bill developed sometime in 2012 has since lapsed. A proposal is made to activate this process and expedite its enactment. Such a law must not only give effect to the right of access to public information by the public, but it must also ensure that such information is proactively disclosed by the entities as well as provided in a timely, efficient and cheap manner whenever required.

9.5.3 Whistle Blower Protection

While Kenya has done commendably well in terms of witness protection, including the enactment of a Witness Protection Act and the establishment of a Witness Protection Agency, the country has lagged behind many other countries in terms of enacting legislation or adopting a policy framework for protection of those who blow the whistle on corruption and other crimes. It is imperative that the country affords protection and other measures to ensure the safety and well-being of those who risk their lives and livelihood by disclosing and exposing corruption scandals to law enforcement agencies. It is noted that in 2014, OAG&DOJ, in consultation with a number of stakeholders, developed a Draft Whistleblower Protection Bill, which is currently undergoing review by the Kenya Law Reform Commission (KLRC). It is recommended that the Bill be finalized as a matter of priority.

CHAPTER TEN: CONCLUSION AND RECOMMENDATIONS

1. In its Conclusion, the Task Force recalls the statement delivered by H.E. Uhuru Kenyatta, CGH, President and Commander-in-Chief of the Kenya Defence Forces in his *State of the Nation Address* to Parliament on 26th March, 2015, during which he directed the Attorney-General (AG) to co-ordinate the review of the legal, policy and institutional arrangements for fighting corruption in Kenya, following which the AG appointed the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, vide Gazette Notice No. 2118 of 30th March, 2015. This Conclusion presents just but a summary of the highlights of the major observations, conclusions and recommendations that the Task Force considers important for purposes of ensuring a wholesome approach to preventing and combating corruption in Kenya, especially in the Public Sector.
2. The Task Force is cognizant of the fact that issues of anti-corruption, leadership and integrity are inherent in the Constitution of Kenya and that it is the duty of each and every person in Kenya to uphold the national values and principles of governance, which encompass integrity, transparency and accountability, among others. In that regard, it is the responsibility of every person resident in Kenya, whether or not a public officer, to embrace and cherish the tenets of zero tolerance to corruption in all spheres of life.
3. The Task Force also recognizes the fact that Kenya was the first country to sign and ratify the United Nations Convention against Corruption (UNCAC) when it was opened up for signature and ratification in Merida, Mexico, on 9 December, 2003, and that Kenya was one of the first countries in Africa to sign the African Union Convention on Preventing and Combating Corruption (AUCPCC) and that the country has taken steps towards the implementation of the two conventions. Further, the Task Force has noted that Kenya is working with other EAC Partner States towards the conclusion of an EAC Protocol on Preventing and Combating Corruption. As such, there are high expectations, from local and foreign partners and stakeholders on the need for a serious onslaught on corruption and the need to promote a culture of ethics and integrity in the Public Sector and the country at large.
4. One of the key innovations that the country has undertaken and implemented under the Constitution of Kenya, 2010, is the establishment of the devolved system of government. Some of the objects of devolution are: to promote democratic and accountable exercise of power; to foster national unity by recognizing diversity; to give powers of self-governance to the people in the exercise of the powers of the State and in making decisions affecting them; to recognize the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalized communities, and to ensure equitable sharing of national and local resources throughout Kenya, among others. As such, there are potential benefits to be realized out of devolution, as has been attested to by the reports of various County governments and their citizens since devolution was adopted in 2013. Regretfully, the potential benefits of devolution as envisaged under the Constitution of Kenya, 2010, may be compromised or watered down unless urgent measures for preventing and combating corruption in the devolved system of Government.
5. Owing to the serious negative effects of corruption in the country, the Government needs to strengthen the capacity of all the key agencies involved in the fight against corruption, especially the Ethics and Anti-Corruption Commission (EACC), the Office

of the Director of Public Prosecutions (ODPP), and the Judiciary, to marshal all the necessary resources and skills for purposes of expediting investigation, prosecution and adjudication of corruption, economic crime cases and ethical breaches especially by public officers who are custodians of the peoples trust on prudent management of public affairs. The Task Force believes that the recommendations contained in this Report, if implemented, will go a long way towards strengthening the internal capacities of such institutions and enhancing inter-agency collaboration in the fight against corruption.

6. At the same time, there is need to strengthen the role of other relevant complementary institutions whose work impacts the fight against corruption. These include the Presidency; Office of the Attorney-General and Department of Justice (OAG&DOJ); National Police Service (the Directorate of Criminal Investigations); the Kenya Revenue Authority (KRA); the Independent Electoral and Boundaries Commission (IEBC); the Public Procurement Oversight Authority (PPOA); the Financial Reporting Centre (FRC); the Office of the Auditor General; the Office of the Controller of Budget; the Inspectorate of State Corporations, and the Efficiency Monitoring Unit (EMU). These agencies/institutions play a critical role towards supporting and complementing the fight against corruption. Additionally, anti-corruption awareness campaigns currently being spearheaded by the National Anti-Corruption Campaign Steering Committee (NACCSC) should be undertaken throughout the country.
7. The fight against corruption should be waged within the framework of the Constitution, the applicable law, and the principles of the rule of law. Thus, notwithstanding the incessant public pressure on the fight against corruption and economic crime in all their facets, the tenets of due process and fair trial must be adhered to so that the fundamental rights and freedoms of innocent persons are not compromised in the name of fighting corruption.

In essence, therefore, the fight against corruption should be waged within the framework of the Constitution and the principles of the rule of law. As Justice Fok PJ of Hong Kong SAR succinctly put it in his Key Note Address to the 6th ICAC Symposium, (delivered on 11th May, 2015), on, “The Importance of the Rule of Law to a Corrupt-Free Future”, “...the public interest in the eradication of the evils of corruption, not by any means at all but rather in a principled manner in accordance with the rule of law, should be the central focal point of any vision of a corruption-free future.”¹⁷⁵

The Task Force has noted that the fight against corruption cannot and will not be won by “fighting corruption” *per se*, but by putting in place legal, policy and institutional arrangements that not only prevent opportunities for corruption but also effectively punish those who engage in the vice in a timely and deterrent manner. The law must ensure there is certainty of detection, timely investigation and prosecution, and just punishment for engaging in corruption. In addition, the law should ensure that the corruptly-acquired benefit is sequestered and either put out of reach for enjoyment by the suspect or otherwise restituted to its lawful owner. This has been the focus of the recommendations made in this Report.

8. The Task Force recognizes and appreciates the central role that the EACC, as the lead anti-corruption agency in the country, is expected to play in the fight against corruption. It has, therefore, come up with far-reaching recommendations on the

¹⁷⁵Hon. Mr. Justice Fok PJ, “The Importance of the Rule of Law to a Corrupt-Free Future”, Key Note Address delivered on 11th May, 2015, during the 6th Independent Commission Against Corruption (ICAC) Symposium on *A Future Without Corruption – One Vision, Multiple Strategies*, Hong Kong Convention Centre, Hong Kong SAR, 11-13 May, 2015.

structure and operational establishment of the agency. The Task Force notes with appreciation that some of the recommendations have already been implemented through the Ethics and Anti-Corruption Commission (Amendment) Act, 2015 (No. 12 of 2015), which commenced operation on 3rd September, 2015. The main gist of the amendments introduced is to increase the number of Commissioners of EACC from three to five, serving on a part-time basis and also to ensure that EACC officers are beyond reproach in terms of conduct. This will help to streamline and enhance the efficiency and effectiveness of EACC.

9. On the question of prosecution of corruption cases, the Task Force considered the current constitutional framework, the relationship between ODPP and EACC over the prosecution of corruption and economic crime cases. The main issue was whether or not EACC should be granted prosecutorial powers. The Task Force considered best practices over the prosecution of corruption cases in a number of jurisdictions, such as: France; Hong Kong SAR, Singapore; Norway; Denmark; UK; Mauritius; Botswana; Nigeria; Rwanda; Tanzania, Uganda, and USA. The Task Force also considered Kenya's past experience and jurisprudence over the prosecution of corruption cases, especially under the defunct Kenya Anti-Corruption Authority (KACA), the Anti-Corruption Police Unit, and KACC. The Task Force also carefully considered the memorandums submitted by various stakeholders over the matter. Finally, the Task Force assessed the capacity of ODPP to undertake effective prosecution of corruption and economic crime cases.

Eventually, the Task Force has concluded that bearing in mind that ODPP is now an independent constitutional office, which has expanded throughout the Republic such that it has offices in all the 47 counties of the republic and 16 sub-counties, and that the concurrence rate over references from EACC investigations is over 90%, and further, in the interest of good governance, ODPP should continue to prosecute corruption and economic crime cases investigated by EACC. The Task Force notes that a shared responsibility ensures objectivity and impartiality, and creates the necessary checks and balances to prevent abuse of power by any actor in the process of fighting corruption.

10. In the interest of transparency and accountability, just like EACC is required to publish quarterly reports in the *Kenya Gazette* on investigations into corruption and economic crime cases, besides the Annual Report submitted to the National Assembly and the President, ODPP should publish and disseminate quarterly reports, through the *Kenya Gazette* and other media, on the action taken over cases referred to it by EACC.
11. Overall, the Government should strengthen the capacities of EACC and ODPP to enable the two institutions undertake their respective mandates more effectively and competently. In particular, the Government should allocate adequate financial resources to enable EACC and ODPP acquire adequate physical facilities and to recruit adequate staff for purposes of enhancing their execution of their mandate. It is important to have the two agencies housed in government owned offices, for purposes of safety and security.
12. On adjudication of corruption and economic crime cases, the Judiciary has appointed Special Magistrates (magistrates of or above the rank of Principal Magistrate) in various parts of the country, to hear and determine corruption and economic crime matters on a priority basis, as per the provisions of ACECA. However, in practice, such Special Magistrates are usually assigned other duties, which creates a backlog of corruption and economic crime cases. In order to meet the intents and purposes of the establishment of the institution of Special Magistrates, the Judiciary should ensure that

Special Magistrates prioritize and expedite the adjudication of corruption and economic crime matters as per the provisions of the Act.

13. Appreciating the economic and social impact of corruption in Kenya and the slow pace of the resolution of corruption and economic crime cases, mainly because of a plethora of constitutional references and judicial review applications lodged by suspects before or after arraignment in court, the Task Force recommends that the Chief Justice should establish an Anti-Corruption and Economic Crimes Division of the High Court to hear and determine corruption matters investigated by EACC, and related offences which may be investigated by bodies such as the Kenya Revenue Authority (KRA), and the Directorate of Criminal Investigations (DCI).

In the alternative, the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) could be amended to grant a special jurisdiction in the High Court to adjudicate over such matters. Even then, under Article 165(3) (e) of the Constitution, it is possible to grant the High Court such as a special jurisdiction. Elevating the determination of such matters to the High Court will mean that any suspect or accused person who would want to raise an objection over their prosecution on grounds of judicial review or alleged breach of their rights, would do so before the same court that would be hearing their matter so that the matter is expeditiously dealt with. Other countries like Malaysia have such divisions of the High Court and anti-corruption judges who ensure that such matters are heard and determined on a priority basis.

14. In the past, the Presidency has been overlooked in the fight against corruption, The Task Force is of the view that the Presidency should provide the political will and muscle to drive the country's anti-corruption agenda. The Task Force has noted that in countries where the Presidency or the Chief Executive of the country has a reporting relationship with the country's anti-corruption agencies they tend to perform better in terms of implementing anti-corruption initiatives. Such countries include Botswana, Hong Kong SAR, and Singapore.
15. The Office of the Attorney-General and Department of Justice (OAG&DOJ), as the ministry responsible for anti-corruption strategies, ethics and integrity policy issues in Government, has a key role to play in the fight against corruption. OAG & DOJ should continue to provide policy guidance and co-ordination in the fight against corruption to ensure synergy in the fight against corruption and to create avenues for mediation whenever conflicts arise among or within the institutions involved in the fight against corruption. OAG&DOJ should also facilitate the conduct of regular reviews and consultations over the best legal, policy and institutional arrangements for fighting corruption. Further, OAG&DOJ should liaise with Parliament (National Assembly) to facilitate the enactment of some laws which are critical to the fight against corruption, notably on freedom of information and protection of whistleblowers.
16. In Kenya, there is a strong co-relation between politics and corruption. As such, the body which regulates the entry of politicians into State offices, that is the Independent Electoral and Boundaries Commission (IEBC), is an integral actor in the fight against corruption. This is so because of the role IEBC plays in the determination of the eligibility of candidates for election or nomination to a state or public office. As such, there is need to mainstream the role of the IEBC in the fight against corruption especially in handling issues of electoral malpractices, electoral offences, campaign financing, and other electoral practices which may be tainted with corruption. As such, IEBC should be involved in the vetting of persons seeking election to State offices, while EACC vets persons seeking appointment to State offices and other public offices generally.

17. The Office of the Auditor General is a key actor in the fight against corruption and its constitutional independence needs to be safeguarded. The Office is established under Article 229 of the Constitution. It is also one of the designated Independent Offices, alongside the Controller of Budget, as provided for under Article 248(3) of the Constitution. The Task Force was of the view that the budget of the Office should be processed like any other constitutional commission and independent office to avoid unnecessary bureaucratic red-tape which could hamper the performance of its work.

And with regard to the Public Audit (Amendment) Bill, 2014, currently pending in the National Assembly, which bars the Office from real-time sharing of information on ongoing audits with other relevant law enforcement agencies (such as EACC) regarding potential corruption or criminal matters they may notice while conducting their audit function, the Task Force felt that the Bill should be reviewed to empower the Office to share such information so that timely action is taken against any persons suspected of corruption and economic crime.

In addition, the Task Force considered the proposed amendment in the Bill (Public Audit Bill, 2015) to require that the staff of the Office shall be recruited through the Public Service Commission (PSC) and noted that such a proposal compromises the independence of the Office and recommends its withdrawal as it contravenes Article 252(1) (c) of the Constitution which states that each Commission, and each holder of an Independent Office shall recruit its own staff.

18. There is an urgent need to mainstream the National Police Service (NPS) in the fight against corruption. Past anti-corruption efforts have assumed the role of the Police in the fight against corruption, ostensibly because of the regular ranking of the Police Department as one of the most corrupt Government departments. Following the significant Police reforms which have taken place since 2008¹⁷⁶ and more recently following the adoption of the new Constitution, there is need to appreciate the critical role the NPS can play in the fight against corruption and economic crimes, especially bearing in mind their law enforcement capability. More significantly, NPS has a constitutional obligation to prevent corruption and to promote and practise transparency and accountability, particularly within its rank and file, as per the provisions of Article 244(b) of the Constitution. Thus, while NPS should of necessity strengthen its internal capacity to combat corruption, especially through its Internal Affairs Unit, NPS should also collaborate with EACC over the fight against corruption within the Police sector and in all other sectors of the economy. At the same time, NPS should disseminate information to the public and other stakeholders on mechanisms for lodging complaints against Police officers who engage in corruption.
19. The Task Force considered the role of the Assets Recovery Agency (ARA) (established under the Proceeds of Crime and Anti-Money Laundering Act, 2009) in the fight against corruption. It was noted that although the Agency has an acting Director, it is yet to be fully operationalised. The Task Force is of the view that ARA should be fully operationalised so that it can assist EACC, where needs-be, in the recovery of acquired out of the proceeds of corruption and economic crimes. Further, there is need to strengthen inter-agency cooperation, especially between ARA and EACC, in order to ensure that corruptly-acquired assets are expeditiously recovered. This co-operation will also seek to ensure that EACC focuses on asset recovery arising from the proceeds of corruption while ARA focuses on asset recoveries from other crimes.

¹⁷⁶ On Police reforms generally, see; Republic of Kenya: *Report of the National Task Force on Police Reforms* (Chairman: The Hon. Mr. Justice (Rtd.) Philip Ransley) (Nairobi: Government Printer, October, 2009)

Additionally, ARA should be delinked from OAG&DOJ in order to give the agency sufficient autonomy for purposes of efficiency and effectiveness, as expected of law enforcement agencies under POCAMLA. ARA should be established and structured like the Witness Protection Agency, if it is to deliver on its mandate effectively. Kenya could borrow best practices in asset recovery from countries such as China, Botswana, Romania and Italy.

20. The National Treasury should consider prioritizing funding for various anti-corruption agencies. In addition, it (the National Treasury) should facilitate the purchase or development of stand-alone office facilities for EACC, and ODPP, so to ensure adequate safety and security for the management, staff and the documents used by the two offices.
21. The Office of the Controller of Budget should enhance its oversight role to ensure that funds allocated to various Ministries, Departments and Agencies (MDAs), including County governments, are not embezzled through corrupt transactions.
22. On capacity-building and development, the Task Force notes that generally, all institutions involved in the fight against corruption are affected by human and capital capacity constraints. Therefore, there is need to fast-track the resolution of capacity issues in all the organizations involved in the fight against corruption to enable them to deliver the required services.
23. For purposes of synergy with other actors in the justice chain, consideration should be made to include the EACC as a member of the National Commission on Administration of Justice (the NCAJ). NCAJ is established under the Judicial Service Act, 2011 and brings together all the justice sector institutions.
24. On strategies to enhance the fight against corruption, the Task Force proposes that in the short-term (as a quick-win), EACC should prioritise enforcement action against corruption (investigations and asset recovery). Similarly, the bulk of EACC's financial and human resources should be dedicated to enforcement work.
25. In the medium to long-term, adequate resources should be dedicated to prevention of corruption activities. Prevention is considered the best strategy for fighting corruption as it is cost-effective, efficient and attracts the least resistance. In the meantime, the Ethics and Anti-Corruption Commission Act, 2011 (EACC Act) should be amended to provide for the enforcement of the recommendations of EACC made pursuant to the conduct of a corruption risk assessment or systems audit or an advisory on the implementation of a Code of Conduct and Ethics and other anti-corruption measures.
26. On public education and anti-corruption awareness creation, the Task Force took the view that while, on the face of it, the public education function of EACC and the sensitization and awareness creation campaign mandate of the National Anti-Corruption Campaign Steering Committee (NACCSC) appear to duplicate each other, there is a subtle distinction between the two. The concept behind the establishment of EACC was that it would principally fight corruption, especially in the Public Sector, and even in other sectors. On the other hand, the rationale behind the establishment of NACCSC was that it would focus on mass anti-corruption awareness creation, targeting the general public. As such, in the interest of synergy and economical utilisation of resources, EACC should, without prejudice to its Constitutional or statutory mandate, focus on the provision of formal public education targeting the Public Sector and organized formal groups, besides its other mandates of enforcement, prevention, asset recovery, and promotion of leadership and integrity. On its part, NACCSC should focus on anti-corruption sensitization and awareness creation campaign targeting the general public and informal groups. OAG&DOJ in exercise of

its policy oversight over the fight against corruption in the country, should provide guidance to either or both institutions, should conflicts arise over the exercise of their mandates.

27. The Task Force noted that public procurement is a corruption-prone area in the Public Service. In order to engender ethics and integrity in the sector, the Task Force recommends, *inter alia*, an amendment be made to the Public Procurement and Asset Disposal (Amendment) Bill, 2015 to provide for a Code of Conduct and Ethics (in the Schedule to the Act) to be signed by all suppliers of goods and services to government MDAs committing themselves to uphold integrity in the procurement process.

In addition, the Task Force recommends an insertion in all procurement contracts concluded by public entities, a clause to the effect that if it is discovered that the contractor bribed a public officer or offered any form of benefit before, during or after the conclusion of the contract, the contract shall be rendered null and void and that the public entity or the Government would not be under any obligation to honour any term or condition in the contract, and further that an affected public entity could either by itself or through EACC initiate proceedings towards the recovery of any benefit obtained by anyone through a corrupt transaction.

28. The Task Force examined the issue of real versus perceived corruption and noted that while the country appears to have done well in terms of enacting laws and setting up institutions to deal with real corruption, there still appears to be a gap in terms of dealing with the perceived corruption. The Task Force proposes that EACC, OAG&DOJ and other stakeholders come up with effective strategies for dealing with the high levels of corruption perception.

29. In the fight against corruption, especially in transitional democracies or post-conflict societies, there is always a case for amnesty and restitution. Kenya is still recovering from the aftermath of the 2007/2008 post-election crisis¹⁷⁷ and other post-independence socio-economic and political upheavals which have encumbered the country from realizing its full potential.

Additionally, there are many cases where innocent persons were drawn into corrupt transaction or even allocated public property without their knowledge. Thus, the Task Force was of the view that EACC and ODPP should invoke the provisions of ACECA and the Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulations, 2011, if needs-be, to grant amnesty and facilitate restitution where the conditions set under the law and the Regulations have been met. The Task Force took the view that not every minor infraction of the law should warrant a full-scale investigation or prosecution, if the suspect or accused person is ready and willing to abide by the amnesty and restitution conditions set by EACC and ODPP. Additionally, in cases of minor breaches of administrative procedures, EACC and ODPP should recommend disciplinary action, such as surcharge, or such other commensurate forms of punishment by an affected public entity.

30. On leadership and integrity issues affecting elected leaders, the Task Force observes that there is need for the development of an effective mechanism for compelling elected leaders who are implicated in corruption or unethical practices to vacate office (“step-aside”) while they are under investigation. While the Task Force appreciated that the concept of “stepping-aside” had no formal legal basis, the Task Force felt that to some limited extent, Section 42 of the Leadership and Integrity Act, 2012, deals

¹⁷⁷ On the 2007/2008 post-election crisis, see generally: Republic of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007* (Chairperson: Judge Johann Kriegler), (Nairobi: Government Printer, 27th September, 2008).

with the matter, but needs some strengthening, in line with the original Leadership and Integrity Bill, which had more stringent conditions.

In the alternative, the Task Force recommends that ACECA be amended to provide for State Officers to vacate office during active investigations touching on them or their office. It is proposed that EACC be empowered to issue a seven-day notice to any person who is under active investigation and likely to interfere or is actually interfering with investigations to be asked to vacate office for a period of sixty (60) days to pave way for investigations. If the suspect does not vacate the office within the set time-frame, then the suspect will have committed an offence. Besides having the power to charge the suspect in court for disobeying the vacation notice, EACC may seek an *ex parte* court order to compel the suspect to vacate their office pending the conclusion of the investigations. If the investigations are not concluded within 60 days, EACC may apply to court for an extension of sixty more days. The Task Force opines that it is only public officers against whom sufficient cause for a full investigation has been established after a preliminary investigation who should be asked to step aside. Nobody should be subjected to stepping aside merely because an allegation has been made against him or her.

31. Regarding to the vetting of persons seeking elective positions, the Task Force recommends that persons seeking clearance to seek election or nomination to the Executive or Parliament or County Governments (including County Assembly) should seek clearance from IEBC. The conditions required of such officers should be the same as persons seeking appointment to state or public offices, though there may be a few modifications. The agencies from which clearance should be sought as listed in the original Leadership and Integrity, 2012, should be re-introduced, i.e.: The Ethics and Anti-Corruption Commission; the Office of the Director of Public Prosecutions; the Chief Registrar of the Judiciary; the Directorate of Criminal Investigations; the Higher Education Loans Board; the Kenya Revenue Authority; the Registrar of Bankruptcy; Credit Reference Bureau, and a professional body (if the applicant or candidate is a member of a professional body), among others.
32. With regard to the vetting of persons seeking appointment to State or Public offices, the Task Force recommends that such persons should be vetted by EACC. Nonetheless, the Task Force appreciates that even in a case where EACC is investigating a person or the person is being prosecuted by the DPP or other agency, and even if the person has been convicted but has lodged an appeal or review of his sentence, the person cannot be barred from seeking election or appointment to a State or Public Office, bearing in mind the provisions of Article 99(3) of the Constitution.
33. The Task Force recommends that for purposes of enforcing the provisions of the Leadership and Integrity Act, 2012 (No. 19 of 2012), the IEBC should be the lead agency to deal with elected leaders while EACC deals with appointed leaders/officials.
34. On Declarations of Income, Assets and Liabilities (financial declarations) of State Officers and Public officers, the Task Force recommends that EACC should be the central depository of all the financial declarations of State officers and that all State officers shall file their declarations with EACC once every two years as provided for under the Public Officer Ethics Act, 2003 (No. 4 of 2003) (POEA). A public entity or responsible Commission may require State Officers within its jurisdiction to submit to it a duplicate copy of the declaration they file with EACC. However, the rest of Public Officers will continue to file their declarations with their respective responsible Commissions as per the provisions of POEA.

35. Anti-corruption and law enforcement bodies, such as EACC, National Police Service (NPS), the Kenya Revenue Authority (KRA), the National Intelligence Service (NIS), among other law enforcement agencies, should have unrestricted access to the financial declarations of State officers or public officers.
36. The Task Force notes that there is general ignorance and misinformation to the effect that the financial declarations filed by Public Officers under POEA are secret. To the contrary, Section 30 of the Act provides for public access to the financial declaration of any public officer, upon lodging an application to the appropriate responsible Commission which has custody of such declarations, as per the provisions of Section 3 of the Act. Further, mechanisms for applying for access to such information, and restrictions on the usage of such information, have been provided for under the Public Officer Ethics (Management, Verification, and Access to Financial Declarations) Regulations, 2011 (L.N. No. 179 of 25th November, 2011). The Task Force requests OAG&DOJ to sensitize Public Officers, responsible Commissions and the general public about the matter.
37. The current system of financial declaration is manual and makes it difficult for responsible commissions, EACC, and other law enforcement agencies, to interrogate the contents of the financial declarations. In addition, the physical declaration forms cost a lot of resources to print, transport and store. The Task Force recommends that EACC, in consultation with OAG&DOJ, should facilitate the development of an on-line system for the filing of financial declarations, for all public officers.
38. The current financial declaration form (in the schedule to POEA) does not capture some material information regarding all the income, assets and liabilities of a state or public officers. Thus, the Task Force recommends that OAG&DOJ facilitates the review of the financial declaration form (in the schedule to POEA) for purposes of capturing all material information touching on the financial status of a State officer or Public officer.
39. The Task Force considered the perennial complaint over lack of adequate storage for financial declaration forms and the length of time the forms are supposed to be kept. Under the law, financial declarations are retained by the responsible Commissions for at least five years after the public/state officer has ceased to be a public officer. This has led to the accumulation of voluminous declaration forms in some responsible Commissions especially those which receive declarations from many public officers, like the Public Service Commission (PSC) and the Teachers Service Commission (TSC). The Task Force recommends that the financial declarations, or the information contained therein, should be kept for a period of at least ten years after which it may be destroyed by the public entity which has custody of the forms or information after five years of the statement date, unless a person has raised an objection to such destruction. This is meant to facilitate the provision of convenient storage and easy retrieval of the information contained in the financial declarations.
40. On matters of financial probity, the Task Force deliberated on the question as to whether information provided by Credit Reference Bureaus (CRBs) could be treated as sufficient legal ground for barring a person from election or appointment to a State or Public office. The Task Force observes that CRBs, which are regulated by the Central Bank of Kenya, may provide useful information for determining whether or not a candidate or an applicant for a State Office or Public Office is creditworthy or otherwise. The fact that a person is indebted should not be taken as a bar to seeking election or appointment to a State or public office. Further, when it comes to bankruptcy, which is one of the grounds of disqualification for a person seeking

election as a Member of Parliament, under Article 99(2) (f) of the Constitution (if a person “is an undischarged bankrupt”) the final word as to whether a person is or is not an undischarged bankrupt should come from the Judiciary and the Registrar of Bankruptcy as opposed to CRBs.

41. On the issue of the implementation of international anti-corruption obligations, Kenya is a State Party to the UN Convention against Corruption (UNCAC), and the African Union Convention on Preventing and Combating Corruption (AUCPCC). As such, Kenya is expected to implement the provisions of the two anti-corruption instruments, and that the President is required under Article 132(5) of the Constitution to ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries. The two anti-corruption instruments contain model anti-corruption legal provisions which, if fully implemented in Kenya could significantly enhance the legal and institutional framework for fighting corruption. The Task Force noted that Kenya has been reviewed on its UNCAC implementation in 2013/2015 review period and that the country has also been reviewed on its AUCPCC implementation (2012). The Task Force observed that Kenya was highly-rated in terms of compliance with its international obligations under UNCAC and AUCPCC and its involvement of non-state actors in the UNCAC review process was cited as best-practice for consideration by other countries. The Task Force recommends timely reviews of the implementation of the anti-corruption conventions to which Kenya is a State party and timely implementation of the country review reports.
42. The Task Force has noted that there is a clear need for strong institutional linkages and collaboration in the fight against corruption. Multi-agency co-operation is critical for purposes of ensuring synergy and efficiency in the fight against corruption. Where a matter arises or a complaint is reported to several agencies and several agencies commence investigations on the basis of the said complaint or information, the agencies shall refer the matter to EACC, if the matter manifests some elements of corruption and economic crime. If the matter touches on other crimes generally, the matter should be referred to the Directorate of Criminal Investigations (DCI) or to another appropriate authority. If there is a dispute as to which institution has jurisdiction to undertake an investigation, the Director of Public Prosecutions (DPP) may arbitrate. If a legal opinion on the matter is required, reference shall be made to the Attorney-General (AG).
43. In case a matter is under investigation by another agency, other than EACC, and it is later discovered that there is an element of corruption, the matter should be transferred to EACC. Thus, ACECA should be amended to enable EACC to take over the investigations. This used to be the case during the days of the defunct Kenya Anti-Corruption Commission (KACC) and Kenya Anti-Corruption Authority (KACA) in relation to the former Criminal Investigations Department (CID).
44. On matters touching on the implementation of international anti-corruption obligations or mutual legal assistance (MLA), the lead agency shall be OAG&DOJ. Nonetheless, the Task Force recommends that OAG&DOJ puts in place appropriate measures to ensure expeditious transmission of MLA requests. Further, the Task Force calls upon OAG&DOJ to strengthen the capacity of the MLA Central Authority (under OAG&DOJ) to handle MLA requests expeditiously.
45. The Task Force appreciates that fighting corruption requires constant sharing of information with similar law enforcement agencies locally or internationally. Subject to the enabling laws of the various anti-corruption bodies, the Task Force recommends that institutions involved in the fight against corruption may collaborate with each

other at bilateral or multi-lateral levels or within the framework of multi-sectoral forums such as the Kenya Leadership and Integrity Forum (KLIF) or other forums such as the Integrated Public Complaints and Referral Mechanism (IPCRM), among others.

46. The country should consider, adopting a law that rewards whistle blowers whose reports result to recovery of public funds or assets as well as provide a framework for *qui tam actions* whereby recovery suits are instituted by private persons for the state with a portion of recovered damages being awarded to the plaintiff as incentive. Apart from enhancing the quality of reports, such law would encourage private sector participation in scrutiny and oversight of public spending. The incentive provided makes implementation of such law practical and sustainable without additional institutions and costs to the State. This strategy has been employed with a lot of success in countries such as USA; under the False Claims Act.
47. On the issue of the fight against corruption in the devolved system of Government, the Task Force noted that according to reports from EACC, the Auditor General, the Controller of Budget, the Senate, the media, and civil society organisations, that corruption in some of the counties had reached alarming levels and that unless quick preventive and enforcement measures were taken, the gains expected from the devolved system of government were going to be severely compromised. In order to address this problem, the Task Force recommends a number of remedial measures:-
 - (a) The Government should facilitate the expansion of EACC so that it establishes offices in all the 47 counties of the Republic and where necessary, in some sub-counties, just like ODPP.
 - (b) The Government, through the Ministry of Devolution and Planning, should facilitate the establishment of Huduma Centres in all the 47 counties of the Republic, and if possible, in some sub-counties, to facilitate public access to a one-stop-shop for commonly-required government services which have in the past been used as avenues for corruption or “rent-seeking” behaviour.
 - (c) There is need to mainstream the fight against corruption into the management of counties. The strategies used to fight corruption at the national level could be modified and backed up by more innovative anti-corruption measures in order to address rising levels of corruption in the devolved units. EACC and other law enforcement agencies should provide technical support towards the development of such preventive strategies.
 - (d) OAG&DOJ and the Kenya Law Reform Commission should provide the necessary technical support to County Governments and County Assemblies to ensure that the laws passed by County Assemblies measure up to the expected legislative standards and that they do not conflict with national legislation, except where a matter is within the exclusive constitutional mandate of a county.
 - (e) There is need to decentralise the national inter-agency arrangements for fighting corruption to the counties.
 - (f) The on-going job evaluation by the Salaries and Remuneration Commission (SRC) should be cascaded to the counties so as to address human resource management issues in the devolved system of government.
48. The Task Force considered the issue of training on anti-corruption, leadership and integrity issues. It has been noted that there is a need for specialised training for judicial officers, prosecutors and investigators and other officials involved in the fight against corruption. The joint training of investigators and prosecutors undertaken by

EACC and ODPP was cited as a best practice which should be emulated by other law enforcement agencies.

49. There is need for long-term strategy for training public officers, students and members of the public generally on anti-corruption, ethics and integrity issues. Consequently, OAG&DOJ, Ministry of Devolution and Planning, the Ministry of Education, Science and Technology, and EACC should co-operate over the development of leadership and integrity education programmes for all levels of education, and leadership and integrity programme for public officers, in line with the provisions of Section 53 of the Leadership and Integrity Act, 2012 (LIA). For public officers, the leadership and integrity programme should be made mandatory and offered through the Kenya School of Government (KSG) or other accredited tertiary institutions. And for the leadership and integrity education programme, this should be offered throughout the education system in the country, through subjects such as Civics or Social Ethics and Responsibility.
50. To ensure a sustainable provision of training to anti-corruption bodies, there is need for the establishment of a National Anti-Corruption Academy (NACA). Consequently, OAG & DOJ and EACC should establish and operationalize the Academy, in collaboration with other relevant stakeholders. Kenya may borrow from the examples of Malaysia and Nigeria, which have established national anti-corruption academies: the Malaysia Anti-Corruption Academy (MACA), and the Anti-Corruption Academy of Nigeria (at Kefi, Nigeria), respectively. It is also not worthy that some regional economic groups have started establishing anti-corruption academies, such as the ECOWAS Anti-Corruption Academy in Nigeria.
51. Kenya should also proceed to ratify the *Instrument Establishing the International Anti-Corruption Academy*. The Instrument establishes the International Anti-Corruption Academy (IACA), based in Austria. Kenya was one of the Founder Members of IACA, having signed the instrument in Vienna, September, 2010. Thus, OAG&DOJ and the Ministry of Foreign Affairs and International Trade (MFAIT) should work towards facilitating Kenya's ratification of the IACA Instrument. IACA offers specialised training and regular anti-corruption courses which Kenyan anti-corruption officials, prosecutors and judicial officers could immensely benefit from. By becoming a Party to the IACA Instrument, Kenya would access high quality anti-corruption training and also easily make a case for hosting a regional campus of IACA.
52. Effective onslaught on corruption entails not just fighting corruption *per se*, but by addressing the problem of corruption from a broader governance perspective such as the promotion of the rule of law, observance of constitutionalism, protection of property rights, freedom of the press, political competition, transparent campaign financing, and addressing issues that promotes corruption head on.
53. The upshot of the foregoing is that fighting corruption is a process and not an event. Kenya should be engaged in fighting corruption for the long haul. An effective onslaught on corruption will culminate in bountiful benefits for the people of Kenya and will actualize the aspirations of the Constitution of Kenya, and Kenya Vision 2030. In turn, this will accelerate Kenya's attainment of the Sustainable Development Goals (SDGs) (especially Goal Number 16 on Peace, Justice and Strong Institutions) adopted by the United Nations General Assembly on 25th September, 2015.¹⁷⁸

¹⁷⁸ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (New York: UN General Assembly, 2015). See also: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

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APPENDICES

APPENDIX "T": PROPOSED LEGISLATIVE AMENDMENTS

A. Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)		
S/No	Proposed Amendment	Rationale
1.	Section 2 Delete the definition of the term "Secretary" and substitute therefor the definition of "Director-General"	Following the decision to make chairperson and the members of EACC, part-time commissioners, it has become necessary to enhance the status and responsibilities of the EACC Secretary/CEO.
2.	Section 4 – Delete the word 'two' and substitute therefor the word 'four' immediately after the word 'and' so that the section reads as follows- <i>The Commission shall consist of a Chairperson and four other members appointed in accordance with the Constitution and this Act.</i> ¹⁷⁹	The effect of this amendment is to increase the number of Commissioners to five for the following reasons:- <ul style="list-style-type: none"> • The Constitution 2010 provides that Constitutional Commissions shall have not less than three (3) and not more than nine (9) Commissioners. • To ensure good corporate governance, the number of Commissioners should be adequate as to allow proper headship of Committees that are the pillars of sound corporate management practice. • It is also easier to achieve a quorum to transact the business of the Commission even when a vacancy arises.
3.	Section 7(2) – Delete the expression 'full-time' appearing in subsection 2 and replace therefor 'part-time', so that the section reads as follows:- <i>The Chairperson and Members of the Commission shall serve on a</i>	The import of this amendment is to alter the terms of service for Commissioners from full time to part time for the following reasons:- <ul style="list-style-type: none"> • The day to day management of the Commission operations lies under the Secretary, as the head of the Secretariat. This ensures work is best when the

		<ul style="list-style-type: none"> • As a Commission with a wide and complex mandate, the oversight function is best discharged by professionals in varied fields well established and distinguished in their respective careers. Invariably, such calibre of personalities is relatively busy and it is near impossible to attract them to serve on a full time basis. • It has been proved beyond doubt that a full time oversight function in a law enforcement agency such as EACC is a recipe for conflict and malfunction.
4.	<p>Insert a new subsection immediately after subsection 10 (1) as follows-</p> <p><i>“(IA) The Commission shall be properly constituted notwithstanding a vacancy in its membership.”</i></p>	<ul style="list-style-type: none"> • To acknowledge the legal personality of Commission and its corporate character. • To shield the Commission from challenges of its composition on grounds of a vacant position in its membership (see similar provision in section 7(3) of the IEBC Act.
5.	<p>Amendments to section 11:</p> <p>(a) Introduce the following amendments to expand the mandate of the Commission to include private sector corruption and introduce corporate penalties and sanctions.</p>	To bring private sector corruption under the ambit of the Ethics and Anti-Corruption Commission.
6.	<p>Amend Section 11(1)(j) by inserting the phrase</p> <p><i>“including such property or proceeds of corruption that are located outside Kenya”</i> immediately after the word “measures”</p>	<ul style="list-style-type: none"> • There should be no doubt as to the capacity of the Commission to follow, recover and repatriate corruption proceeds outside the country.
7.	<p>Insert a new paragraph 11(1) (k) to provide to a mechanism for enforcement of recommendations for revision of methods of works or procedures that may be conducive to corrupt practices.</p>	<ul style="list-style-type: none"> • To commit institutions to mainstream and implement corruption prevention strategies. • Establish an enforcement mechanism for implementation of recommendations by the

	<p><i>“(ka) A Public body shall, not later than three months of receipt of instructions from the commission pursuant to revision of methods of work or procedures that that may be conducive to corrupt practices effect the necessary changes in practices and procedures.</i></p> <p><i>(kb)Where a public body considers that the changes in the practices and procedures as contained in the instructions would be impracticable or otherwise disadvantageous to the effective discharge of its duties, the public body shall make representation to the commission in writing, within 7 days of receipt of instructions.</i></p> <p><i>(kc) Upon considering the representation of the public body concerned, the Commission may confirm, vary or cancel the instruction, as it may think appropriate and the commission’s decision shall be final.</i></p> <p><i>(kd) The head of the public entity which fails to comply with instructions of the commission or variation thereof commits an offence and shall be liable on conviction to a fine not less than one million Kenya shillings.</i></p> <p><i>(ke) In addition to penalty prescribed above, the head of the public body shall be subject to disciplinary measures including dismissal or removal from office.”</i></p>	<p>Commission pursuant to a revision of methods of work or procedures.</p>
<p>8.</p>	<p>Amend Section 11 by inserting the following new paragraph immediately after paragraph (j):</p> <p>(ja) <i>“implement the provisions of Parts VII to XII of the Proceeds of Crime and Anti-Money Laundering Act, 2009 in respect of proceeds of crime related to corruption and economic crimes and, for that purpose, exercise all powers conferred upon the Asset Recovery Agency.</i></p>	<ul style="list-style-type: none"> • Cures the existing overlaps/duplication of functions between the Asset Recovery Agency and Ethics and Anti-Corruption Commission in respect of proceeds related to corruption and economic crimes. • Brings efficiency in utilization of resources - no need to investigate corrupt conduct and hand over to another agency to recover proceeds of crime.

9.	<p>Amend Section 11 by inserting the following subsections immediately after subsection (1):-</p> <p><i>(1A) In this sub-section, the expression "proceeds of crime" shall have meaning assigned to it in section 2 of the Proceeds of Crime and Anti-Money Laundering Act, 2009.'</i></p> <p><i>"(1B) Nothing in this section shall be construed to require the consent of the Director of Public Prosecutions as a pre-condition for preferring or laying charges in court."</i></p>	<ul style="list-style-type: none"> • Subsection (1A) is intended to define "proceeds of crime" as used in section 11 paragraph (ja) proposed immediately above. • Subsection (1B) is intended to cure a problem of interpretation problem which has proved to be a bottleneck in the prosecution of corruption cases e.g. the Court of Appeal decision in the <i>Kangangi case</i>¹⁸¹ which stated that DPP's consent is required to prosecute corruption cases. • Constrain the interpretation of Sections 11(d) of the Ethics and Anti-Corruption Commission Act, 2011 and the Anti-Corruption and Economic Crimes Act, Cap 65 to their intended objective i.e. accountability for decisions made by EACC and the ODPP.
10.	<p>Section 11 (3) delete the word "may" appearing immediately after the word "Commission" and substitute therefor the word "<i>shall</i>"</p>	<ul style="list-style-type: none"> • Make it mandatory for the Commission to collaborate with other agencies
11.	<p>Delete Section 11 (4)</p>	<ul style="list-style-type: none"> • The subsection is similar to Section 13 (1) and therefore repetitive.
12.	<p>Develop Regulations under section 32 to give effect to section 11 (Provide mechanism for EACC to enforce procedures on agreed methods of work after the revision contemplated under Section 11 (1) (i).</p>	<ul style="list-style-type: none"> • There is a need for the EACC to enforce the agreed methods of work agreed that it makes on corruption prevention.
13.	<p>Section 13 (2) – Insert the following two new paragraphs, immediately after paragraph (e):-</p> <p><i>(ea) summon and enforce attendance of any person for examination.</i></p>	<ul style="list-style-type: none"> • The proposed provisions will enhance the investigative capacity and power of the Commission, by enabling it to conduct investigations more efficiently and expeditiously. The provisions seek to address the challenge of potential witnesses snubbing summons to

¹⁸¹ See: *Nicholas Muriuki Kangangi v. AG* [2011]eKLR.

	<p><i>(eb) require the discovery and production of any document; and</i> <i>(ec) subject to the Constitution and any written law,</i></p> <p>Insert the following subsection immediately after subsection (2)</p> <p><i>(2A) In a trial for prosecution of corruption or economic crime or civil proceeding instituted by the Commission in the exercise of its mandate, a report, record or document from a government office prepared or produced pursuant to any written law shall, in absence of any evidence to the contrary, be admissible and is proof of the contents thereof without calling the maker, if it is accompanied by a certificate of a competent officer of the authority.</i></p> <p><i>(Regulations to provide timelines etc)</i></p>	<p>appear or seeking to challenge the summons through the courts</p> <ul style="list-style-type: none"> • The provisions would also empower the Commission to enforce production of documents and reports emanating from other investigative, regulatory and law enforcement bodies such as KENAO and PPOA.
14.	<p>Section 16- amend as follows:</p> <p>i) Delete the marginal note and substitute therefor the following “Director –General of the Commission”</p> <p>ii) Insert a general amendment clause to the following effect: “delete the word “Secretary” wherever appearing and substitute therefor the phrase “Director-General”</p> <p>iii) 16(7) Delete the phrase “The Secretary shall” and substitute therefor the phrase:</p> <p>iv) “The Director General shall, for purposes of Article 250 (12) of the Constitution, be the Secretary to the Commission and shall—</p>	
15.	<p>Section 17, Amend as follows-</p> <p>(a) In subsection (1), Delete the words “<i>by the Commission for</i>” and substituting therefor the following phrase “<i>on any of the following grounds</i>”; and</p>	<ul style="list-style-type: none"> • The day-to-day management of the Commission operations falls under the Secretary, as the head of the Secretariat. This calls for the vesting of security of tenure to the Secretary, to enhance independence of the office.

	<p>(b) In subsection (2), Delete the subsection and substitute therefor the following:-</p> <p><i>“(2) Where the question of removal of the Secretary arises under subsection (1), the Commission or any other person so interested shall present a petition to the National Assembly setting out the facts constituting the grounds upon which the intended removal is sought.</i></p> <p>(c) Insert the following new subsections immediately after subsection (2):</p> <p><i>(2A) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under subsection 1, shall send the petition to the Chief Justice for appointment of a tribunal;</i></p> <p><i>(2B) The tribunal shall consist of-</i></p> <p><i>(a) A person who holds or has held office as a judge of a superior court, who shall be the chairperson;</i></p> <p><i>(b) A person who is qualified to be appointed as a judge of the High Court; and</i></p> <p><i>(c) One other member who is qualified to assess the facts in respect of the ground(s) for removal.</i></p> <p><i>(2C) The tribunal shall within 60 days investigate the matter and advice the Commission of its decision, which shall be binding.</i></p> <p><i>(2D) Notwithstanding the above, and the provisions of section 16(4) of this Act; the Secretary shall, unless his office becomes vacant by reason of his death or resignation, continue in office until a replacement is appointed in accordance with this Act.</i></p>	<ul style="list-style-type: none"> • The appointment of the Secretary goes through a rigorous procedure which includes Parliamentary approval. It is necessary to balance the procedure for removal with that of appointment. • As the Accounting Officer, it is important to ensure continuity in the office and appropriate handing over in case of replacement.
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B. Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)

<p>16.</p>	<p>Introduce in Section 2 the interpretation of the term “associate” to mean: <i>“associate”, in relation to a person, means-</i> <i>(a) a person who is a nominee or an employee of that person;</i> <i>(b) a person who manages the affairs of that person;</i> <i>(c) a firm of which that person, or his nominee is a partner or a person in charge or in control of its business or affairs;</i> <i>(d) a company in which that person or his nominee, is a director or is in charge or in control of its business or affairs, or in which that person, alone or together with his nominee, holds a controlling interest, or total share capital; or</i> <i>(e) the trustee of a trust, where-</i> <i>(i) the trust has been created by that person; or</i> <i>(ii) the total value of the assets contributed by that person to the trust at any time, whether before or after the creation of the trust, amounts, at any time, to not less than twenty per cent of the total value of the assets of the trust;</i></p> <p>Delete Section 27(2) of the Act.</p> <p>Amendment to Section 2 to expand the application of the Act and mandate of the Commission to cover private sector corruption-insert new subsections immediately after subsection (2)—</p> <p><i>“(2A) Jurisdiction of the courts of Kenya for the purposes of this Act extends to:</i> <i>(i) every place within Kenya, including territorial waters;</i></p>	<p>To introduce a more definitive meaning of the term “associate” and make it applicable to any offence under the Act.</p> <p>It also encompasses corruption within the private sector committed mainly through Companies and Trusts.</p> <p>To bring private sector corruption under the ambit of the Ethics and Anti-Corruption Commission.</p> <p>Enhance the jurisdiction of the Kenyan courts to address corruption-related offences committed within and without Kenya.</p>
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	<p>(ii) a Kenyan national abode vessels or aircraft flying the Kenyan flag;</p> <p>(iii) a person who is not a Kenyan national but has his/her habitual residence in Kenya;</p> <p>(iv) conduct of a Kenyan national that takes place outside Kenya if the conduct would constitute an offence of corruption or economic crime or a predicate offence under the Kenya law;</p> <p>(v) A national of another State who is resident in Kenya during the commission of the offence.</p> <p>“(2B) Where an act or omission otherwise amounting to corruption occurs in relation to a non-public office, this Act shall be construed with alterations, qualifications and adaptations necessary to bring it into application of that act or omission.”</p> <p>“(2C) For the purposes of this Act, a complainant in corruption and economic crime matters shall be deemed to be the State.”</p>	
17.	<p>Amend the definition of “public body” to align it with the new governance structure under the Constitution of Kenya, 2010.</p> <p>“public body” means a public office as defined under Article 260 of the Constitution and includes a corporation, whether or not the remuneration and benefits of the office are paid from the Consolidated Fund or out of money provided by Parliament;”</p>	<p>In the long term there is need to amend the definition of “public office” under Article 260 of the Constitution to expand the scope and include all bodies under national and county governments that do not receive funding from the Consolidated Fund or money provided by Parliament but are otherwise public e.g. water companies in the counties.</p>
18.	<p>Section 5 – Insert subsection 5 (3A) immediately after subsection (3)</p> <p>“(3A) A trial involving corruption or economic crime shall be heard and determined within two years from the date of filling the charge”</p> <p>Delete the proviso to section 62(Misc. Amendments) Act 2014 (Act No. 18/2014).</p>	<p>It is important to conclude a trial as soon as possible. The Statute Law (Misc. Amendments) Act 2014 (Act No. 18/2014) amended section 62 by introducing a proviso that when a state or public officer is charged with corruption or economic crime, he/she shall be suspended at half pay until conclusion of the case, provided that the case shall be concluded within 24 months. It is not clear</p>

		<p>what the intention of the proviso is; whether to expedite conclusion of such cases or to ensure that such officers are reinstated to their jobs if the case delays beyond 24 months.</p>
<p>19.</p>	<p>Insert a new section immediately after section 23 to read:</p> <p>Powers of the Director-General or an investigator</p> <p>23A (1) <i>An investigator may, in writing, require any person whom the investigator has reason to believe has information which may assist in the investigation of an alleged offence under this Act to attend before him at a police station or police office or EACC Office in the county in which that person resides or for the time being resident.</i></p> <p>(2) <i>A person who without reasonable excuse fails to comply with the requirement under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him commits an offence.</i></p> <p>(3) <i>A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.</i></p> <p>(4) <i>An investigator shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the investigator shall warn the person that any statement which may be recorded may be used in evidence.</i></p> <p>(5) <i>A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.</i></p>	<p>Expressly provide for police powers within Anti-Corruption and Economic Crimes Act, 2003 instead referencing across statutes.</p> <p>See section 26 of ACECA Director's (exclusive) power to require written statement of a suspect's property. Section 28 power to require production of documents.</p>

	<p><i>(6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code, the Witness Protection Act or any other written law.</i></p> <p><i>(7) The failure by an investigator to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.</i></p> <p><i>(Can be achieved under section 28 (2))</i></p>	
20.	<p>Insert a new Section 23B to read:</p> <p>Search by an investigator</p> <p><i>(1) The Secretary may, by writing, authorize an investigator to search any person, if it is reasonably suspected that such person is in possession of property corruptly or illicitly acquired or to search any premises, vessel, boat, aircraft or other vehicle whatsoever in or</i></p> <p><i>(2) Which there is reasonable cause to believe that any property corruptly or illicitly acquired has been placed, deposited or concealed.</i></p> <p><i>(3) The investigator authorized to make any search under this section may make any search and, for the purpose of so doing may enter, using any reasonable force into or upon any premises, vessel, boat, aircraft or any other vehicle whatsoever.</i></p> <p><i>(4) Delete section 29)</i></p>	<ul style="list-style-type: none"> • Simplify the investigative tool of search and make it more efficient and effective. • To prevent abuse of power by requiring the authority to undertake a search to be issued under the hand of the Secretary. • To prevent leakages of impending searches to suspects.
21.	<p>Insert a new Section 23C to read:</p>	<p>Expressly provide for police powers within Anti-Corruption and Economic Crimes Act, 2003 instead of referencing across statutes.</p>

	<p>Power to bond</p> <p><i>An investigator investigating an alleged offence may require any person to execute a bond in such sum and in such form as may be required, subject to the condition that the person shall duly attend court if and when required to do so.</i></p> <p><i>(2) A person who refuses or fails to comply with a requirement lawfully made under subsection (1) commits an offence.</i></p> <p><i>(3) Notwithstanding the foregoing provisions, the powers conferred under this section shall be exercised in strict accordance with the Criminal Procedure Code.</i></p> <p><i>(4) A person who contravenes subsection (2) is guilty of an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.</i></p>	
22.	<p>Section 25A(1) – Delete and substitute therefore with the following:</p> <p><i>(1) The Commission may in consultation with the Director of Public Prosecutions, tender an undertaking not to institute or continue with investigations against any person suspected of an offence under this Act.</i></p>	<p>An undertaking not to institute or continue with investigations in exchange for full disclosure of information relating to the case amounts to a pardon from eventual prosecution. The provision seeks to substitute the Attorney-General with the DPP, to harmonize the section with the current constitution dispensation where the powers to prosecute are vested on the DPP.</p>
23.	<p>Section 25A(2)–(5) Consider making an amendment with a view to:</p> <ol style="list-style-type: none"> 1. Do away with the requirement to advertise. 2. Limiting the undertaking to a specific matter being handled by the Commission and allowing persons to make amends in respect of the specific investigation. 3. The undertaking not to apply generally to matters not known at the time the undertaking is being made. 	<ul style="list-style-type: none"> • Persons shy away from the process that is thrown to public limelight • Reduce the time taken in undertaking the project.

	Amnesty regulations to be informed by the amendments to the ACECA.	From experience suspected offenders have shied away from seeking amnesty because they view the conditions to be too draconian.
24.	Section 25A (3) (b) Substitute the word “ <i>Minister</i> ” with the “ <i>Cabinet Secretary responsible for integrity issues</i> ”.	To expressly recognize the function of the Attorney-General, whose office equates to the Cabinet Secretary on matters of ethics and integrity.
25.	Section 27 (1) – Delete and substitute therefore with the following: <i>(1) The Commission may by notice in writing require an associate of a suspected person to provide, within reasonable time specified by the Secretary in the notice, a written statement of the associates property specified in the notice.</i>	This is intended to remove the requirement for the Commission to initiate such proceedings through the court. The current process, where the Commission is required to apply through an <i>ex parte</i> application, is cumbersome and leads to a situation where the Commission has to disclose the evidence to the court, which may have ramifications on confidentiality.
26.	Section 28 (1) – delete the opening statement and substitute therefore with the following: <i>(1) The Commission may by notice in writing-</i>	This is intended to remove the requirement for the Commission to initiate such proceedings through the court. The current process, where the Commission is required to apply through an <i>ex-parte</i> application, is cumbersome and leads to a situation where the Commission has to disclose the evidence to the court, which may have ramifications on confidentiality.
27.	Amend Section 29 by deleting the words “ <i>The Commission</i> ” and replacing therefor “ <i>An investigator</i> ”	This is to remove an apparent absurdity that the Commission as a body can undertake a search rather than its investigators.
28.	Insert a new Section 29(2) to read: <i>29 (2A) Nothing in Section 29(1) shall be construed to mean that an investigator must in any other circumstance give notice before entering upon and searching any premises with a warrant.</i>	Give effect to the subsisting jurisprudence by the High Court.
29.	Section 33 – Delete the word “ <i>Director</i> ” wherever it appears and substitute therefore with the word “ <i>Secretary</i> .”	This important amendment appears to have been overlooked in the Statute Law (Miscellaneous Amendments) Act, 2014.

30.	<p>Quarterly accountability reports by the ODPP: Insert a new section 35A to read as follows:</p> <p><i>“35A(1) The Director of Public Prosecutions shall prepare quarterly reports setting out the number of reports made to the Director of Public Prosecutions under section 35, prosecutions concluded and the results and such other statistical information relating to those reports as the Director of Public Prosecutions considers appropriate.</i></p> <p><i>(2) A quarterly report shall indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted.</i></p> <p><i>(3) The Director of Public Prosecutions shall give a copy of each quarterly report to the Attorney-General.</i></p> <p><i>(4)The Attorney-General shall lay a copy of each quarterly report before the National Assembly.</i></p> <p><i>(5) The Director of Public Prosecutions shall cause each quarterly report to be published in the Gazette.</i></p>	<ul style="list-style-type: none"> • Enhance accountability and transparency by the ODPP by requiring the ODPP to publish quarterly reports in the Kenya Gazette on decisions made reports made under section 35 as well as concluded prosecutions. • Marches the quarterly accountability by EACC under section 36.
31.	<p>Amend Sections 35, 36 and 37 of Anti-Corruption and Economic Crimes Act, 2003 to expressly delink recommendations to DPP from criminal justice process to purely an administrative and accountability process for decisions made.</p> <p>Insert the following new section 35(2A) to read:</p> <p><i>“Nothing in this section shall be construed to require the consent of the DPP as a condition to preferring or laying charges in court.”</i></p>	<ul style="list-style-type: none"> • The interpretation currently given to this section is to revert to the old concept of consent to prosecute under Prevention of corruption Act which had been abandoned. • It has proved to be a bottleneck in the prosecution of corruption cases e.g. the Court of Appeal decision in the <i>Kangangi</i> case which stated that DPP’s consent is required to prosecute corruption cases. • There is no rationale for such requirement in anti-corruption cases.
32.	<p>Section 37(1) – Delete the words “Attorney-General” and substitute therefore the words “Director of Public Prosecutions”.</p>	<p>Prosecutorial power vests in the DPP</p>

<p>33.</p>	<p>Section 39 expands the scope of offence of bribery beyond bribery involving agents.</p> <p><i>(1) Any person who whether alone or in conjunction with any other person, corruptly solicits or receives, agrees to receive, any gift, loan, fee, reward, or other consideration as an inducement to act in particular manner is guilty of a felony.</i></p> <p><i>(2) Any person who shall whether alone or in conjunction with any other person, corruptly gives, promises or offers any gift, loan, fee, reward or other consideration to any person, as an inducement shallot act in a particular manner is guilty of a felony.</i></p> <p><i>(2A) For the purposes of subsection (2), where a person gives, promises or offers any gift, loan, fee, reward, or other consideration to another person, knowing or having reasonable cause to believe that doing so may constitute an offence under subsection (1), shall be deemed to have acted corruptly.</i></p> <p><i>(3) Any person who commits an offence under this section shall be liable to imprisonment for a term not exceeding ten years or to a fie not exceeding three times the value of the loss-</i></p> <p><i>(consider maximum sentence</i></p> <p><i>(b) in addition -</i></p> <p><i>(i) where such person is an agent, to be ordered by the court to pay to his principal, in such manner as the court may direct, the amount or value of any gift, loan, reward, consideration or advantage received by him or any part thereof; or</i></p> <p><i>(ii) whether such person is an agent or not, to be ordered by the court to forfeit the whole or such part as the court may direct, of the amount or value of any gift, loan, reward, consideration and advantage received by him, and that the whole or part of the residue be forfeited; or</i></p>	<p>As currently framed the offence does not capture persons other than those bound by an identifiable principal-agent relationship.</p> <p>To capture bribery of public foreign officials.</p> <p>Align section 39 with section 3 of the repealed Prevention of Corruption Act.</p>
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34.	<p>Amendment to Section 41 (2) insert the word “makes,” immediately after the word “principal,”</p> <p>Insert the following new section immediately after section 41:</p> <p><i>“41A A person who, being in such capacity as to require him or to enable him to furnish returns or statements touching on any sum payable or claimed to be payable to himself or to any person or touching any other matter required to be certified for the purpose of any payment of money or delivery of goods to be made by any person, makes a return or statement touching any such matter which is, to his knowledge, or reasonably expected to be within his knowledge to be false in any material particular is guilty of an offence.</i></p> <p><i>41B A person who—</i></p> <p><i>(a) being a director or officer of a corporation or company, receives or possesses himself as such of any of the property of</i></p>	<ul style="list-style-type: none"> • Criminalize making documents with intention to commit corruption and economic crimes. • Criminalize false claims by employees in both public and private sectors. • Criminalizes fraudulent appropriation or accounting through methods particularly employed by directors of private sector corporations and other persons in private and public sector.

	<p><i>the corporation or company otherwise than in payment of a just debt or demand, and, with intent to defraud, omits either to make a full and true entry thereof in the books and accounts of the corporation or company, or to cause or direct such an entry to be made therein; or</i></p> <p><i>(b) does any of the following acts with intent to defraud, that is to say—</i></p> <p><i>(i) destroys, alters, mutilates or falsifies any book, document, valuable security or account which belongs to the corporation or company, or any entry in any such book, document or account, or is privy to any such act; or</i></p> <p><i>(ii) makes, or is privy to making, any false entry in any such book, document or account; or</i></p> <p><i>(iii) omits, or is privy to omitting, any material particular from any such book, document or account, is guilty of an offence.</i></p>	
35.	<p>Insert a new Section 44A to read as follows:</p> <p><i>Any person who colludes or attempts to collude with any other person to-</i></p> <p><i>(a) refrain from submitting a tender, proposal, quotation or bid;</i></p> <p><i>(b) withdraw or change a tender, proposal, quotation or bid; or</i></p> <p><i>(c) submit a tender, proposal, quotation or bid with a specified price or with any specified inclusions or exclusions, is guilty of an offence.</i></p>	There is an increase in procurement related offences that involve collusion.
36.	Amend Section 45(2) (a) to insert the words "or unlawfully" immediately after the word "fraudulent".	Criminalize unlawful payment for goods, works and services.

37.	Section 45(2) – criminalize the making of payment or excessive payment for “works not undertaken or not undertaken in full or are sub-standard”.	The section recognizes “goods” and “services” as the key elements of procurement. However, “works” have also been recognized as distinct from the two terms, and constitute the bulk of procurement processes.
38.	Amend Section 46 by deleting and substituting therefor with. <i>46. Any person who intentionally uses his office or position, in violation of law or applicable procedures and guidelines, in the performance or failure to perform an act in the discharge of his functions or use of position to improperly confer a benefit on himself or another person or entity, commits an offence.</i>	<i>Criminalize abuse of position</i> • Abuse of position is a serious concern in Kenya. It is also one of the offences provided for under the UNCAC, as one of the mandatory offences
39.	Insert the following new section <i>46A. (1) A person who gives or agrees to give or offers an advantage to another person, to cause a public officer to use his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body commits an offence.</i> <i>(2) A person who gives or agrees to give or offers an advantage to another person to use his influence, real or fictitious to obtain work, employment, contract or other benefit from a public body commits an offence.</i> <i>(3) A person who solicits, accepts or obtains an advantage from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body commits an offence.</i> <i>(4) A public officer who solicits, accepts or obtains an advantage from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body commits an offence.</i>	<i>Criminalize trading in influence</i> • Influence peddling is a serious concern in Kenya. It is also one of the offences provided for under the UNCAC, as one of the mandatory offences
40.	Section 47(A) (4) – Insert the following words “procures, counsels or aids” immediately after the word “incites”.	Aiding in commission of corruption and economic crime has become an issue of great concern recently with corrupt persons using proxies to commit offences.

41.	Insert a Section 47(2)(c) (Interface Section 47 with Section 3 of POCAMLA)	Criminalize laundering of proceeds of corruption and economic crime
42.	Introduce minimum sentence of 3 years and minimum fines Kshs. 1,000,000 and provisions for some sentences without the option of a fine.	This is to make corruption and economic crime an unattractive option and act as a possible deterrence.
43.	Amend the title to Part VI by inserting the phrase "ILLICIT ENRICHMENT" immediately before the word "COMPENSATION"	<ul style="list-style-type: none"> • Encompass the broader content of this section as introduced by proposed amendments.
44.	<p>Insert a new section at the beginning of the Part.</p> <p>50A. Illicit enrichment</p> <p>(1) The Commission may commence an investigation on a person where there are reasonable grounds to suspect that the person—</p> <p><i>(a) maintains a standard of living above that which is commensurate with his present or past known sources of income or assets; or</i></p> <p><i>(b) Is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets.</i></p> <p>(2) A person is guilty of corruption if he fails to give a satisfactory explanation to the Commission or the officer conducting the investigation under subsection (1) as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control or possession.</p> <p>(3) Where a court is satisfied in any proceedings for an offence under subsection (2) that, having regard to the closeness of his relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the</p>	<ul style="list-style-type: none"> • Illicit enrichment is a serious concern in Kenya and should be criminalized. • It is also one of the offences provided for under the UNCAC, Article 20 (though not one of the mandatory offences) • Other UNCAC member States, e.g. Botswana, have fully criminalized illicit enrichment.

	<i>accused, or acquired such resources or property as a gift, or loan without adequate consideration, from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.</i>	
45.	Section 55- Insert a new subsection immediately after subsection (9): “(9A) For greater certainty, proceedings under this section shall be civil proceedings.”	To remove the uncertainty on the interpretation of the section with regard to the burden of proof. ¹⁸²
46.	Section 56A (2) – to delete the words “ <i>Director or Assistant Director</i> ” and substitute therefore with the words “ <i>the Secretary</i> ”.	With the abolition of the offices of Director that existed under the former KACC, there is need to align the provision with the existing legal framework.
47.	Amend Section 56B(3) to insert the words “in consultation with the DPP” after the word “may”	This is in recognition of the constitutional role of the DPP, arising from the provisions of Article 157 of the Constitution.
48.	Section 61A – Substitute the word “ <i>Director</i> ” wherever it appears with the word “ <i>Secretary</i> ”	With the abolition of the offices of Director that existed under the former KACC, there is need to align the provision with the existing legal framework.
49.	Section 62 (5) – Delete the word “ <i>Attorney-General</i> ” and substitute with “ <i>Director of Public Prosecutions</i> ”	Prosecutorial power vests in the DPP
50.	Amend the Anti-Corruption and Economic Crimes Act, 2003 inserting the following new section 62A to read as follows: <i>62A (1) This section applies in respect of an elected or nominated State officer under investigation or a function of whose office is under investigation by the Commission.</i> <i>(2) In this section, “stepping aside” means temporary withdrawal and deprivation of powers and privileges of an</i>	This proposed section seeks to create a legal framework for “stepping-aside” by State officers who are under active investigations. The rationale behind this provision is to ensure that a State officer under active investigations (by EACC) does not obstruct or interfere with investigations if he or she is the subject of the investigations. It is noteworthy that, as per the proposed Section 62A(7), it is only the High Court which may issue a mandatory

¹⁸²In the case of *Ethics and Anti-Corruption Commission (the legal successor of the Kenya Anti-Corruption Commission) v Stanley Mombo Amuti* [2015] eKLR of 2013), per Koome, Okwengu, and Azangalala, JJA, the Court of Appeal allowed an appeal in favour of EACC, founded on Section 55 of ACECA – where the Respondent had been asked by KACC (the precursor to EACC) to account of his “unexplained assets”.

	<p>office to include, but not limited to; vacation of office, participating in decision making, voting, supervising, drawing of allowances, enjoying benefits linked to the office or function.</p> <p>(3) Subject subsection (5), a State Officer under investigation or a function of whose office is under investigation shall step aside to facilitate investigations on the recommendation of the Commission to the relevant authority.</p> <p>(4) Where there is no identifiable responsible office to which a recommendation may be made, the Commission shall require the State Officer to step aside.</p> <p>(5) The provisions of subsection (3) shall apply where the Commission has upon preliminary investigations established grounds to reasonably suspect that the State Officer is likely to:</p> <ul style="list-style-type: none"> (a) conceal, alter, destroy, remove records, documents or evidence; (b) intimidate, threaten or otherwise interfere with witnesses; or (c) interfere with investigations in any other matter <p>(6) Where the Commission recommends or directs stepping aside under paragraph (3) the State Officer shall step aside for a period of sixty days.</p> <p>(7) Where a State Officer refuses or otherwise fails to step aside within seven days of receipt of a notice under subsection (3), the Commission shall apply <i>ex parte</i> to the High Court for orders to compel the State Officer to step aside for sixty days.</p> <p>(8) Provided that the "stepping aside" referred to in</p>	<p>"stepping-aside" order upon hearing EACC <i>ex parte</i>, where the State officer has been issued with a notice by EACC to "step-aside" and they have declined. This mechanism is aimed at ensuring that due process is adhered to during the entire exercise.</p> <p>In addition, "stepping-aside" does not amount to a removal of a State officer, because that is dealt with either under the Constitution or other relevant laws. For instance, a notice by EACC or an order by the High Court as envisaged under Section 62(A)(7) would not amount to a removal of a Governor within the meaning of Article 181 of the Constitution.</p> <p><u>Reservation by the Council of Governors (CoG):</u></p> <p>The Council of Governors expressed reservation and opposed the proposed Section 62(A) of ACECA, contending that: (i) the concept of "stepping-aside" is constitutionally and legally unacceptable; (ii) it was not clear as to what would become of the executive powers of a Governor when he has "stepped-aside", and (iii) there is no distinction between "stepping-aside" and removal from office.</p>
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	<i>paragraph (3) shall be limited to performance of the functions of the office under investigation.</i>	
51.	Duty to report an act of corruption or economic crime: Insert a new section 64 to read as follows: <i>“64A Every person has an obligation to report suspected corrupt conduct or economic crime”.</i>	<ul style="list-style-type: none"> Place an obligation upon every citizen to report suspected acts of corruption or economic crimes.
52.	Insert a new section immediately after section 65: 65A Concurrent criminal and civil proceedings <i>Notwithstanding the provisions of this Act or other law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings under this Part shall not be a ground for any stay, prohibition or delay of the criminal proceedings.</i>	<ul style="list-style-type: none"> To clear doubts as to the regularity of parallel civil and criminal proceedings where a subject matter is substantially in issue in both.
53.	Section 66(1) – Introduce a new paragraph immediately after paragraph (a); <i>(aa) “Knowingly give false information to an investigator or officer of the Commission acting under this Act”.</i>	From experience, some people will deliberately give false information, but it becomes difficult to charge them under section 66(1) (b) of ACECA due to the requirement of <i>mens rea</i> .
C. Elections Act, 2011		
54.	Amend Section 22 (1) by inserting the phrase “Leadership and Integrity Act” immediately after the word “Constitution”	This is to provide a link between the Elections Act, 2011, and the Leadership and Integrity Act, 2012, for purposes of ensuring that LIA is applied in the electoral process.
D. Leadership and Integrity Act, 2012 (No. 19 of 2012)		
55.	Delete section 4(5) (delegation of functions by the Commission) and replace therefor with a new section 4(5) to read as follows: <i>The Commission may, by notice in the Gazette, delegate to Accounting</i>	To vest individual responsibility to the Accounting Officer or authorized officer of a public entity and establish a mechanism for compelling compliance.

	<i>Officer of a public entity or an authorized officer any of its powers and functions under this Act.</i>	
56.	Insert a new subsection 4(6) to read as follows: <i>An accounting officer or authorized officer who fails to comply with a request made under subsection (3) commits an offence.</i>	To vest individual responsibility to the Accounting Officer or authorized officer of a public entity and establish a mechanism for compelling compliance.
57.	Insert a new subsection 4(7) to read as follows: <i>The request under subsection (3) shall be communicated in writing and served upon the accounting officer or authorized officer.</i>	<ul style="list-style-type: none"> • To place responsibility on an individual officer for follow-up purposes.
58.	Delete section 6(3) , 6(4) and 52	<ul style="list-style-type: none"> • These sections link POEA with LIA and extend the application of LIA to Public officers. • To keep LIA specific for State officers and POEA to govern Public officers. • Chapter 6 of the Constitution addresses itself to conduct at the leadership level. • LIA should address the conduct of state officers (Persons in leadership positions) • POEA to address conduct of Public officers (public officers in lower cadres) • Section 6(3) uploads POEA to be part of LIA without repealing POEA. Section 52 similarly extends the application of LIA to public officers. • Amendment delinks LIA from POEA limiting its scope of application and gives it sharper focus on State officers. There is little value in extending vetting requirement to all cadres of public officials.
59.	Insert a subsection 12A(1) immediately after 12A to read: <i>Upon receiving the Self Declaration under subsection (1), the</i>	Candidates with integrity issues are appointed to state offices despite the Commission recommendations.

	<p><i>Commission may make appropriate recommendations to the public entity.</i></p> <p><i>Amend the self declaration form to remove the requirement for attestation by Commissioner for Oaths or Magistrate.</i></p>	<p>To allow for easy digitization of the self-declaration form and to avoid subjecting applicants to unnecessary processes.</p>
60.	<p>Add a new Part IIIA titled “VETTING FOR COMPLIANCE WITH CHAPTER SIX OF THE CONSTITUTION” to provide for procedures for vetting persons seeking for appointive and elective public positions as well as periodical vetting having the following provisions:</p> <p>1. <i>“The Ethics and Anti-Corruption Commission may, on application by any person, issue a certificate to that person or any other interested person or institution, confirming, that a particular State officer or a candidate for election or appointment to a State office is compliant or not compliant with some or all of the provisions of Chapter Six of the Constitution and this Act.</i></p> <p>2. <i>Before issuing the certificate referred to under sub-section (1), the Commission may consult with law enforcement agencies, professional associations, and public bodies, including but not limited to –</i></p> <ol style="list-style-type: none"> <i>i. the Directorate of Criminal Investigations;</i> <i>ii. Kenya Revenue Authority</i> <i>iii. The Office of the Director of Public Prosecutions</i> <i>iv. Relevant Responsible Commission in case of serving or retired Public or State officer</i> <i>v. The Registrar of Bankruptcy</i> <i>vi. Credit Reference Bureau</i> <i>vii. A professional body (if the applicant or candidate is a member of a professional body).</i> 	<ul style="list-style-type: none"> • Currently, a legal framework for vetting candidates seeking public positions or public bodies undertaking periodical vetting is non-existent. • This part should encompass substantive and procedural provisions on vetting and issuance of clearance certificates by EACC. Part III should include the current section 13.

	<p>3. <i>Where the Commission issues a certificate under sub-section(1) confirming that a particular State officer or a candidate for election or appointment to a state office is not compliant with one or all the provisions of Chapter Six of the Constitution or this Act, that State officer or candidate shall not be eligible for election or appointment to a state or public office</i></p> <p>4. <i>A certificate of compliance issued under this section shall be valid for six months, from the date of issuance.</i></p> <p>5. <i>In addition to the information received from the Ethics and Anti-Corruption Commission and the bodies listed under subsection (2), the recruiting or appointing body or person may give full consideration of, and opportunity for, information about the past record of a candidate for election or appointment to a state office, for purposes of ensuring that a person with a propensity to violate Chapter Six of the Constitution is not appointed or elected.</i></p> <p>6. <i>For the purpose of this section "past record" includes but is not limited to –</i></p> <ul style="list-style-type: none"> <i>(a) past trial;</i> <i>(b) convictions;</i> <i>(c) acquittals; and</i> <i>(d) any current charges</i> <i>(e)disciplinary actions by public entity and or a professional body</i> <p>7. <i>Every public entity shall be responsible for availing information to a selection panel, appointing authority or Parliament, as the case may be, regarding the non-compliance with the Code by a person seeking appointment or election to a State office.</i></p> <p>8. <i>The Ethics and Anti-Corruption Commission may, as necessary, issue guidelines on the vetting criteria and issuance of certificates</i></p>	
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	<p><i>of compliance with the provisions of Chapter Six of the Constitution and this Act, to persons seeking to be appointed or elected to a state office.</i></p> <p><i>9. Any person dissatisfied with the decision of the Commission may apply for review within 14 days and the review by the Commission shall take place within 30 days.</i></p> <p><i>10. A person who is dissatisfied with the decision of the Ethics and Anti-corruption Commission or any other public body acting under this section may appeal to the High Court.”</i></p>	
61.	<p>Amend section 13 to provide to provide that a person seeking elective position shall seek clearance from EACC as provided in above.</p> <p><i>Amend the First Schedule to remove the requirement to have the declaration form commissioned by a commissioner for oaths or magistrate</i></p>	<ul style="list-style-type: none"> • This section does not serve any purpose unless there is an enforcement mechanism. Mere submission of declaration forms serves no useful purposes without scrutiny and action on the declarations submitted. • To enable the form to be filled submitted electronically.
62.	<p>Insert new section to create an offence under Section 19 for failure to seek the approval of the Commission to open, operate or control a bank account outside Kenya.</p>	<p>Criminalise failure to seek approval of EACC to open or operate bank accounts outside Kenya.</p>
63.	<p>Amend section 16 (conflict of interest) to create an offence for failure to declare a conflict of interest.</p>	<p>Criminalize failure to register or failure to declare interest</p>
64.	<p>Create an offence under Section 19 for failure to submit annual statements of accounts.</p>	<p>Criminalise failure to submit statements of account</p>
65.	<p>Amend Section 20(1) of the Act by deleting the words “except when acting in the course of official duty”</p>	<p>Section 20(1) of the Act provides that “A State Officer shall not be an agent of or further the interest of a foreign government, organization or individual in a manner that may be detrimental to the security of Kenya except when acting in the course of official duty”.</p>

		The Section seems to suggest that a person acting in an official capacity can act in a manner detrimental to the security interests of Kenya. This ought to be an absolute prohibition. It is, therefore, recommended that all the underlined words beginning with and including 'except' be deleted from the paragraph.
66.	Amend Section 23(1) (political neutrality) Delete the words "...other than a Cabinet Secretary or a member of a County executive committee..."	It contradicts Section 24 of the Act that requires impartiality on the part of the State or Public officer.
67.	Amend section 29 to create an offence for misleading information to the public.	Criminalize giving of misleading information to public.
68.	Amend section 30 to create an offence for falsification of records.	Criminalise falsification of records.
69.	Amend Section 31(1) to penalize undeclared dual citizenship by a State officer to read as follows: "A State officer who acquires dual citizenship shall loose his or her position as a State officer." Insert Section 31(2) to create an offence for a State officer taking oath of office before renouncing the other Citizenship Insert Section 31(2) Upon investigations, the commission will make an application to High Court for removal of a State officer who has assumed office without renouncing the other citizenship.	Provide mechanism/procedure for removal of a State officer who has assumed office without renouncing other citizenship. Criminalise taking of oath of office by a State officer who has not renounced the other citizenship.
70.	Section 34 provide sanction for bullying	There is no sanction for the unethical practice.
71.	Amend Section 37 to allow EACC to develop a Specific Leadership Code for State officers and the General Code for Public Officers to be in harmony with Section 11(1) (a)(ii) of EACC Act, 2011 which allows EACC to develop Code of conduct for public officers Insert Section 37(1) to allow EACC to designate and gazette relevant public entities as Responsible Commissions for purpose of enforcement of the Act.	This will avert a situation which may arise pursuant to provisions of section 37, which requires every public entity to develop a specific Leadership Code for its State officers. The requirement has been cumbersome for public entities where some have just one State officer.

	Insert provision for avoidance of doubt; The Responsible Commission for National Assembly will be the Select Committee on Powers and Privileges; for the Senate, the select Committee on Powers and Privileges; for County Assembly; the select Committee on powers and privileges and Governors the Senate.	
72.	Amend Section 37(2) by inserting the following phrase "...with an express provision for sanctions." immediately after "satisfied".	To provide for enforcement of codes.
73.	Insert new sub-section 41(3) to read as follows: <i>"41(3) While granting orders pursuant to an application under subsection(2), the High Court may issue a declaration to effect that the concerned State officer is non-compliant with chapter six of the constitution."</i>	Ensures effective enforcement of LIA
74.	Insert new sections 42A and 42B to read as follows; <i>"42A. A person is not eligible for election or appointment to State office if the person has, as State officer contravened Chapters Six of the constitution or the code or while serving as a public officer, has contravened public officer Ethics Act."</i> <i>"42B. A person is not eligible for election or appointment to a State office if after, a fair administrative action he or she is found to have contravened rules, regulations or codes of conduct on matters related to ethics and integrity."</i>	Ensures effective enforcement of LIA
75.	To make it clear that it is the Commission to investigate and refer a matter to the DPP insert a new subsection 43(1)(d) to read as follows: <i>"43(1) (d). The Commission may on its own initiative investigate any ethical breaches and take appropriate action which may include referral to DPP or other relevant agencies for action."</i>	To enhance clarity
76.	Amend Section 43(1) of the Act by adding a proviso immediately after (but below) the proposed Section 43(1)(d), to read as follows:-	Section 43(1) of the Act requires that when investigations under the Act disclose the Commission of a criminal offence, the Commission shall report the matter to the

	<i>Where the concerned State officer is subject to the Kenya Defence Force Act, 2012(No. 25 of 2012), the matter shall be referred to Director of Military Prosecutions appointed under Section 213 of the Kenya Defence Forces Act.</i>	Director of Public Prosecutions. It is however noted that the offences created under section 46 of the Act can be disposed by a Court Martial when the State Officer is subject to the Kenya Defence Forces Act. In order to create a nexus between the investigations under the Act and prosecutions under the Kenya Defence Forces Act, 2012 (No. 25 of 2012) it is recommended that the Director of Military Prosecutions appointed under Section 213 of the Kenya Defence Forces Act, 2012 be added under Section 43(1) of the Act. It is noteworthy that, as per Article 157(6) (a)of the Constitution of Kenya, the Director of Public Prosecutions cannot institute charges under the Kenya Defence Forces Act.
77.	Section 46 Create more offences and sanctions under various sections highlighted above.	Creation of more offences
78.	Insert 46(1)and include sanctions for ethical breaches and breach of the code to include the following actions, namely– (a) warning and caution; (b) demotion; (c) suspension; (d) dismissal; (e) advising the leader to resign from the office to which the breach relates; (f) imposition of other penalties provided for under the rules of discipline related to the office of the State/public officer; and (g) initiating action for the State officer/public officer to be dealt with under the appropriate law	Provide for sanctions for ethical breaches

	(i) withdrawal of state commendation or awards given (h) Withdrawal of privileges for a specified period.	
79.	<p>Insert new section to provide for Kenya Leadership Integrity Forum as an inter Agency consultative body bring together stakeholders in the fight against corruption.</p> <ul style="list-style-type: none"> • There is established unincorporated body to be known as the Kenya Leadership and Integrity Forum. • The forum is established to foster the promotion of leadership and integrity principles through multi-sectoral consultations, implementation, and peer-review among public, private, civil Society, professional and religious and other sectors. <p>The Forum will be composed of representatives nominated from:-</p> <ol style="list-style-type: none"> a) The National government/President as patron b) County governments/Council of governors c) Parliament d) Judiciary e) Private sector f) Civil society g) Professional organizations h) Faith-based organization i) Media organizations, and j) Labour organizations <p>In accordance with the procedures made by the Ethics and Anti-Corruption Commission.</p>	Bring relevant stakeholders on board in the fight against corruption
80.	Amend Section 51 (2) to provide that the Petition be submitted to the Clerk of the National Assembly.	Currently, the Section provides for submission of a petition to the Cabinet Secretary. Submissions should be made to the approving authority.

81.	<p>Legislate provisions in respect of Articles 194(1) (c) and 103(1) (c) of the Constitution to provide for mechanism for removal of Members of Parliament and Members of the County Assembly.</p> <p>Insert new section to read; <i>where a State officer is found to have breached the Code and notwithstanding the sanctions provided for breach, the commission may make application to the High Court for a declaration to effect that a State officer has contravened provisions of Chapter Six is not fit to hold public office.</i></p> <p>The declaration by the court shall be presented to the speakers of Parliament, County Assembly and IEBC.</p>	<p>Provide procedures and mechanism for removal of members of Parliament and Members County Assembly who have breached Chapter Six of the Constitution.</p> <p>Section 45 of the Elections Act anticipates that for an elected person to be recalled, one must be found, after a due process of law, to have contravened Chapter six of the Constitution. This amendment provides the basis of initiating the process.</p>
82.	<p>Introduce clause on powers to summon witnesses, call for documents in investigations of ethical breaches.</p> <p>For the purpose of investigating ethical breaches the Commission may—</p> <ul style="list-style-type: none"> i) Summon and enforce the attendance of any person for examination; ii) Require the discovery and production of any document; and iii) Subject to the Constitution and any other law requisition any public records or copy thereof from any public officer. <p>A person who neglects or fails to comply with a requirement under this Section is guilty of an offence.</p>	Tool for effective investigations
83.	<p>Amend and add new Part VII titled: Declaration of Income Assets and Liabilities:-</p> <p>(1) Every State officer shall submit to the Commission, a declaration of income, assets and liabilities—</p> <ul style="list-style-type: none"> (a) within thirty days of being appointed or elected and sworn-in as a State officer; 	To provide for State officers to make declarations of income, assets and liabilities

	<p>(b) annually at such time as may be prescribed by the Commission; and</p> <p>(c) Within thirty days of ceasing to be a State officer.</p> <p>(2) A declaration shall be made by the State officer in respect of -</p> <p>(a) the State officer;</p> <p>(b) the State officer's spouse; and</p> <p>(c) The State officer's dependants who are over the age of eighteen years.</p> <p>(d) any property held in trust for the State Officer</p> <p>(3) The declaration shall be in the form set out in the Second Schedule.</p> <p>(4) The declaration may be submitted as a hard or soft copy or in any other prescribed format.</p> <p>(5) Where a soft copy of a declaration is submitted, it shall be considered valid if it bears a unique identification feature which can sufficiently identify the State officer making the declaration.</p> <p>(6) A public entity may obtain from the Commission, a copy of a declaration made by a State officer for whom it is the authorised officer, for purposes of satisfying itself with the integrity and ethical standards maintained by the State officer.</p> <p><i>Date of declarations</i></p> <p>(1) The date for an initial declaration shall be within thirty days of the date the State officer's appointment.</p> <p>(2) The date for an annual declaration shall be the first day of November.</p> <p>(3) The date for the final declaration shall be the date the State officer ceases to be a State officer.</p>	
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	<p><i>Declaration period</i></p> <p>(1) The declaration period for an initial declaration shall be the twelve months preceding the initial declaration.</p> <p>(2) The declaration period for the annual declaration shall be from 1st November to 31st October the date preceding the current statement date.</p> <p>(3) The declaration period for the final declaration shall be from the statement date of the last declaration to the date the State officer ceases to hold the State office.</p> <p><i>Ad hoc declarations</i></p> <p>The Commission may require a State officer to submit a declaration at any other time.</p> <p><i>Clarifications</i></p> <p>The Commission or a public entity may seek clarification from a State officer relating to the information contained in the State officer's declaration form, as may be necessary.</p> <p><i>Information to be correct</i></p> <p>It is the responsibility of the State officer to ensure that the information contained in the declaration is correct.</p> <p><i>Access to declarations</i></p> <p>(1) The Commission shall, facilitate access by any member of the public to the contents of a declaration or clarification made by a State officer.</p> <p>(2) Subject to Article 31 of the Constitution, sub-section (1) shall only apply if the Commission deems that the information requested by the member of the public is related to a justifiable cause.</p> <p>(2) Subject to subsection (1), a person shall make a written request to the Commission stating the information that person is seeking and reason why that person is seeking that information.</p>	
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(3) Any public entity seeking access to the information contained in a declaration made by a State officer, for purposes of discharging its mandate, shall be deemed to have satisfied the conditions set out in subsection (2).

(4) Prior to the Commission making an affirmative decision under this section, it shall grant the opportunity to the affected State officer to make representations on the matter.

(5) The Commission shall keep a register of the requests made and action taken, including the notification of the request made to the concerned State officer.

Custody of declarations and retention of information

(1) The Commission shall receive, maintain, verify, analyse and store every declaration submitted by a State officer.

(2) For purposes of subsection (1), the Commission may exercise all those functions or delegate some of the functions to various public entity or authorised officers or other designated agents.

(3) The information referred to under sub-section (3) may be stored electronically or in any other form, as the Commission may consider appropriate.

Destruction of information

The Commission shall keep the information collected under this Part for ten years from the date of the declaration, after which the information shall be destroyed.

Unexplained income or assets

(1) The Commission may institute inquiries related to unexplained income or assets of a State Officer with relevant bodies and agencies including banks, tax authorities, Companies Registry, insurance companies, the securities exchange and other regulatory bodies.

	<p>(2) The Commission may commence proceedings under this section against a person where—</p> <ul style="list-style-type: none"> (a) a declaration is made by a State officer in respect of himself or herself or any person under this Part; and (b) after an due diligence and investigation, the Commission is sufficiently satisfied that the person has unexplained income or assets; and (c) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the income or assets concerned and his or her declared sources of income or assets and the Commission is not satisfied that an adequate explanation of that disproportion has been given; <p>(3) Whenever the Commission or public entity makes an inquiry or institutes an inquiry into a matter touching on the declaration of a particular State officer, the requested institution shall be obliged to provide the requested information.</p> <p>(4) Proceedings under this section shall be commenced in the High Court by way of originating summons</p> <p><i>Notification of failure to declare</i></p> <p>(1) Where a State officer has failed to submit a declaration or a clarification under this Part, the Commission, in appropriate cases, shall notify the relevant public entity or the authorized officer.</p> <p>(3) Upon receiving a notification under subsection (1), the public entity or the authorised officer, as the case may be, shall institute disciplinary proceedings against the concerned State officer.</p> <p>The Commission subject to the Constitution and this Act, have the duty to receive;</p>	
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	<p>(a) declarations which are required to be made by State officers;</p> <p>(b) allegations and notifications of breach of the Code from members of the public; and</p> <p>(c) Inquire into any alleged or suspected breach of the Code by state officers who are subject to this Act.</p> <p><i>Special responsibilities of the Commission</i></p> <p>(1) In addition to the functions of the Commission under section 11 of the Ethics and Anti-Corruption Commission Act, the Commission shall –</p> <p>(a) provide the declaration forms free of charge to any person seeking to make a declaration of assets and liabilities ;</p> <p>(b) receive and retain custody of declarations made by State officers;</p> <p>(c) ensure compliance with and enforce the provisions on declarations under this Act;</p> <p>(d) receive and investigate complaints of failure to make declarations and where appropriate refer the matter to the authorised officer;</p> <p>(e) require a person to make a clarification as provided for under [section];</p> <p>(f) make administrative procedures as provided for under [section];</p> <p>(g) require a person to make an <i>ad hoc</i> declaration as provided for under [section];</p> <p>(h) subject to the Constitution and any other law, require any public entity or a person holding a public office to disclose any information in connection with a matter under investigation by the Commission;</p>	
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	<ul style="list-style-type: none"> (i) inform and educate State officers on the need to make declarations under this Act; (j) establish and maintain a data bank on the prescribed particulars of each State officer; and (k) Perform any other functions and duties necessary for the effective administration and implementation of this Act and any other written law. <p><i>Abuse of office in the enforcement of this Act</i></p> <p>(1) Any officer of the Commission or a public entity who knowingly and maliciously does any act amounting to abuse or misuse of office to the prejudice of any person in the enforcement of Chapter Six of the Constitution, this Act or regulations made there under commits an offence.</p> <p>(2) Any person convicted under sub-section 1 shall not</p> <ul style="list-style-type: none"> (a) hold State Office or (b) hold any other public office for 10 years <p>(3) No person shall enable, aide, abet, counsel, conspire or be an accessory to the commission of an offence under sub-section 1</p> <p>(4) Any person who commits an offence under this section shall upon conviction be liable to a term of imprisonment not exceeding 5 years and a fine not exceeding Kshs.5 million.</p> <p><i>Safeguarding of information</i></p> <ul style="list-style-type: none"> (1) Subject to the Constitution Article 35 of the Constitution or any other written law, every officer of a public entity or the Commission shall ensure that confidential or secret information or documents entrusted to his or her care are adequately protected from improper or inadvertent disclosure. (2) Any officer who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding one million 	
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shillings or to imprisonment for a term not exceeding one year or to both.

Confidentiality

Subject to Article 35 of the Constitution, the Commission shall keep information relating to an investigation confidential unless such non-disclosure prejudicial to public interest.

Administrative procedures

(1) The Commission shall make administrative procedures for the implementation of this Part.

(2) The administrative procedures shall be established and-- published in the Gazette within ninety days after the commencement of this Act

Offences relating to declarations

(1) A person who—

- (a) submits a declaration or clarification, which contains information that he or she knows or ought to know is false or misleading; or
- (b) Maliciously destroys information collected under this Part, commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.

(2) A person who -

- (a) fails to submit a declaration or submit a clarification as required under Part V; or
- (b) is late in submitting a declaration or a clarification,

Commits an offence and is liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.

	<p>(3) Subsection (2) shall not apply unless the person—</p> <p>(a) has been given notice of not less than thirty days to explain such failure to submit or lateness in making a declaration or clarification; and</p> <p>(b) Has not provided sufficient reason for such failure to make the declaration or clarification.</p> <p><i>Divulging information acquired under this Act</i></p> <p>A person who, without lawful excuse, divulges information acquired in the course of acting under this Act is commits an offence and is liable, on conviction, to a fine not exceeding five years.</p>	
84.	<p>Amend add new Part VIII titled Ethics Tribunal to include provision for establishment of the Code of Conduct Tribunal to investigate ethical breaches under Chapter Six and Leadership and Integrity Act</p> <p>1. Establishment of Code of Conduct and Ethics Tribunal</p> <ul style="list-style-type: none"> • There is established a tribunal to be known as the Code of Conduct and Ethics Tribunal (in this Act referred to as "the Tribunal"). • The Tribunal shall consist of a chairman and two other members. <p>2. Qualification of Chairperson and members of tribunal</p> <ul style="list-style-type: none"> • The chairman shall be a person who has held or is qualified to hold office as a Judge of High Court of Kenya and shall receive such remuneration as may be prescribed by law. • Meets requirements of chapter six of the constitution • Holds a degree from a University recognized in Kenya 	<ul style="list-style-type: none"> • Ethical breaches should be dealt with fairly quickly in an environment devoid of technicalities and complex rules of procedure typical of the ordinary courts. • A tribunal is better placed to deal with ethical breaches so as to allow ordinary courts to deal with criminal and corruption-related matters.¹⁸³

¹⁸³The proposed amendments on the recommended Tribunal should be harmonized with the recommendations of the Task Force appointed by the Chief Justice on the establishment and composition of tribunals.

	<ul style="list-style-type: none"> • Has knowledge and experience of not less than 15 years in any of the following fields; ethics and governance, law, public administration, leadership, economics, auditing and accounting. <p>3. Removal from office of Chairperson or Member</p> <ul style="list-style-type: none"> • Inability to perform functions of the office out of physical or mental incapacity • Gross misconduct or misbehaviour • Incompetence • Violation of the constitution <p>4. Term of Office</p> <ul style="list-style-type: none"> • The term of office for the chairman and members will be for five years. • The chairman and other members of the Tribunal shall be appointed by the President on the recommendation of the Judicial Service Commission <p>5. Additional Powers of the Tribunal</p> <ul style="list-style-type: none"> • The National Assembly may by law confer on the Tribunal such additional powers as may appear to it to be necessary to enable the Tribunal to discharge its functions effectively. <p>6. Staff of the Tribunal</p> <ul style="list-style-type: none"> • The tenure of office of the staff of the Tribunal shall, subject to the provisions of this Act, be the same as that provided for in respect of officers in public service. • The power to appoint the staff of the Tribunal and to exercise disciplinary control over them shall vest in the members of 	
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the Tribunal and shall be exercisable in accordance with the provisions of this Act.

7. Powers of the tribunal

- To adjudicate on all cases on ethical breaches filed by the Commission or responsible commissions and make a finding/decision.
- Where the Tribunal finds an officer guilty of contravening any of the provisions of this Act, for which no penalty has been provided it shall impose upon that officer any of the punishments specified hereunder;

- (a) vacation of office
- (b) disqualification from holding public office for a period not less than five years; and
- (c) seizure and forfeiture of any property obtained by an officer
- (d) Recommend withdrawal of recognition awards, transfer, or naming and shaming.

• The Tribunal may make such further recommendations as to administrative actions, criminal prosecutions as it thinks fit.

• Nothing in this section shall prejudice the prosecution of a public officer punished under this section, or preclude such officer from being prosecuted or punished for an offence in a court of law.

• The tribunal will have powers to summon witnesses and call for documents as it deems fit.

8. Appeal from Decision of the Tribunal

- Where the Tribunal gives a decision as to whether or not a person is guilty of a contravention of any of the provisions of this Act, an appeal shall lie as of right from such decision or from any punishment imposed on such person to the Court of Appeal at the instance of any party to the proceedings.

	9. Rules of Procedure	
	<ul style="list-style-type: none"> The Tribunal will set its own rules of procedure. 	
E. Evidence Act (Cap 80) and the Criminal Procedure Code (Cap. 75)		
85.	<ul style="list-style-type: none"> Overhaul of the Evidence Act and the Criminal Procedure Code to achieve efficiency and effectiveness in criminal trials, Examples of areas for reform include: <ul style="list-style-type: none"> (a) review the conditions for the production of computer print-outs as evidence under Sections 65 and 106 B Allow admissibility of emails and other electronic means to proof conspiracy. 	<ul style="list-style-type: none"> Ensure that only contested issues are taken up for Court hearing sessions so as to hasten the hearing and dissemination of anti-corruption and economic crimes cases. Electronic evidence has become commonplace and accepted and, therefore, there should be a presumption of reliability of the technology/the reliability of instruments in the absence of evidence to the contrary To acknowledge the conspiratory and collusive nature of corruption cases. Recognize that corruption and economic crimes are perpetrated by cartels often populated by persons in authority and those who have direct or indirect control of the very the evidence that may be used against them. Recognise that perpetrators of corruption and economic crimes typically cover their tracks through concealing, destroying or hiding incriminating documentary evidence.
F. The Public Officer Ethics Act, 2003 (No. 4 of 2003)		
86.	Section 2 (definition): Delete "Minister" and replace therefor "Cabinet Secretary" wherever it appears in the Statute and Regulations.	Align the definition of "Minister" with the Constitution.
87.	Amend Section 2 definition of "Public Officer" by inserting the following words "...other than a State officer, who is an..." immediately after the word "officer,"	To comprehensively encompass all public officers serving in the National and Devolved Governments and their affiliated entities.

88.	<p>Definition of a “public officer” Delete Section 2(a),(b) and (c) and replace therefor:</p> <p>(a) <i>the National Government or any department, service or undertaking of the Government;</i></p> <p>(b) <i>Parliamentary Service;</i></p> <p>(c) <i>a County Government;</i></p> <p>(d) <i>any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to County government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;”</i></p>	<ul style="list-style-type: none"> Align the definition of a “public officer” with the definition under Article 260 of the Constitution. To comprehensively encompass all Public officers serving in the National and Devolved Governments and their affiliated entities.
89.	<p>Amend section 3 (Responsible Commissions) and designate other public entities as Responsible Commissions.</p> <p>Insert EACC to designate and gazette public entities as responsible Commissions</p>	<p>Officers serving in a number of entities created under the new Constitution do not have designated responsible Commissions. These include the Senate, new Chapter 15 Commissions, DPP, Controller of Budget, County Executive, County Assemblies, and County Public Service Boards, among others.</p>
90.	<p>Amend Section 3(8) of the Act, by deleting the words “the Armed Forces Act” and replacing with “under Article 241(5) of the Constitution.”</p>	<p>It is recommended that Section 3(8) of POEA be reviewed and aligned to Article 241(5) of the Constitution, under which the Kenya Defence Council is established.</p>
91.	<p>Insert the word <i>close friends</i> in 12(c) immediately after the word associate</p>	<p>Expand the scope of personal interest of a State officer and his office to close friends.</p>
92.	<p>Insert section 15(3) to provide for sanctions for liability for losses resulting from misuse and/or misappropriation of state property. Which may include surcharge, and payment of amount equivalent to the loss or damage incurred?</p>	<p>Provide for sanctions for damage or loss.</p>
93.	<p>Delete section 16(3) on political neutrality</p>	<p>To address issues of political neutrality concerning Members of Parliament and MCAs.</p>

94.	Insert Section 22(3) selection of a public officer to include gender, people of special interest .i.e. people with disabilities, minority groups among others.	Expand criteria for selection to conform to the constitutional requirements.
95.	<p>Review Schedule under section 26(2) (Declaration of Income Assets and Liabilities form) to include information sufficient to identify assets whether held in person or in trust e.g. land, bank accounts, shareholding, motor vehicles, motor vessels movable objects locally and abroad.</p> <p>State officers to submit wealth declarations to EACC: Insert a new section 26(1A)</p> <p><i>The proposed section may read as follows;</i></p> <p><i>26 (1A) Every state officer shall, once every two years as prescribed by section 27, submit to the Ethics and Anti-Corruption Commission a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years</i></p> <p>State officers to submit a duplicate copy of wealth declarations with responsible commissions: Insert a new section 26(1B)</p> <p><i>The proposed section may read as follows;</i></p> <p><i>26 (1B) Every public entity or responsible commission may require state officers within its jurisdiction to submit to it a duplicate copy of the declaration they file with the Ethics and Anti Corruption Commission</i></p>	<p>To provide for greater clarity on the information required in financial declarations.</p> <ul style="list-style-type: none"> • The rationale of the amendment is to introduce a new sub-section that makes EACC to be the central depository for all financial declarations of all State officers and for those State officers to file their financial declarations with the EACC once every two years, as provided under the Public Officers Ethics Act, 2003. • The rationale of the further amendment is to introduce a new sub-section that requires public entities or responsible Commissions to require State officers within their jurisdiction to submit to it a duplicate copy of the declarations they file with EACC.
96.	<p>Amend section 28 (clarification of income assets and liabilities) to provide:</p> <p>28. (1) A person who has submitted a declaration to a Commission may amend the declaration or provide, without undue delay, any clarification requested by the Commission if the request is in writing</p>	Provide for room to amend declarations as well as limit the period for making amendments to six months.

	<p>and is made, within six months after the declaration was submitted to the Commission.</p> <p>(2) Without limiting what a request for clarification may include, such a request may include-</p> <p>(a) a request that any information that may have been omitted be provided; or</p> <p>(b) A request that any discrepancy or inconsistency, including a discrepancy or inconsistency arising because of information other than information included on the declaration, be explained or corrected.</p> <p>(3) No further amendments to the declaration shall be allowed six months after the declaration.</p>	
97.	<p>Confidentiality of declarations: Amend section 30 by inserting a new subsection 30(1a):</p> <p>Confidentiality of declarations: Amend section 30 by inserting a new subsection 30(1a):</p> <p><i>“(1)(a) The responsible Commission shall facilitate unrestricted access to financial declarations and any clarification by public officers to the Ethics Anti-Corruption Commission, National Police Service, Kenya Revenue Authority, National Intelligence Service and any other law enforcement agency of all public officers under this Act upon a written request and notify the affected party after delivery.”</i></p> <p>(1) Amend subsection 30(2) by inserting the word “other” between the words “any” and “person”.</p>	<ul style="list-style-type: none"> • To facilitate investigations by EACC • To facilitate investigations by EACC and any other law enforcement agencies such as the Kenya Police, Kenya Revenue Authority, and the National Intelligence Service.
98.	<p>Reduce period of storage of wealth declarations: Delete section 31(on retention of information) and replace therefor the following;</p> <p><i>“A commission shall keep information collected under this part concerning a person (state officer or public officer) for a period of at</i></p>	<ul style="list-style-type: none"> • The current section 31 provides that information is retained by the responsible Commission for at least 5 years after the public officer has ceased to be a Public officer. This has led to accumulation of voluminous financial declarations in some responsible Commissions

	<p><i>least ten years after the statement date after which it may be destroyed by the public entity which has the custody of the forms or information unless a person has raised an objection to such destruction”.</i></p> <p>Provide for an electronic/online platform for submission, retention and access of the declarations and clarifications: Insert a new section 31A to read as follows:</p> <p><i>“Every Responsible Commission shall develop and maintain an electronic platform for submission, retention, storage, archiving and access of declarations of income assets and liabilities and clarifications.”</i></p>	<p>especially those that receive declarations from very many Public officers (e.g. TSC and PSC).</p> <ul style="list-style-type: none"> • This new amendment is meant to facilitate the provision of convenient storage and retrieval of the information contained in the financial declarations. • Provide for framework for electronic submission, retention and access to financial declarations and clarifications.
99.	<p>Insert a new section 32A to provide for suspension at half pay for officers charged with offences under this Act.</p>	<p>Charges under Section 32 of POEA have a direct ramification on the integrity of the concerned Public officer similar to offences under ACECA.</p>
100.	<p>Amend the Act to provide for a wide range of sanctions and disciplinary measures for breach of the Code including:-</p> <ul style="list-style-type: none"> (a) warning (b) reprimand (c) Suspension from office (d) delay of Promotions (e) deferment of increment; and (f) forfeiture of not more than one-third monthly salary for not more than 12 months (g) dismissal (h) Restitution of any pecuniary benefits received because of the violation committed. (i) A civil penalty for loss occasioned by the violation committed. (j) Withdrawal of privileges for a specified period 	<p>Currently there are limited sanctions for ethical breaches.</p>

G. Judicial Service Act, 2011		
101.	Amend the Judicial Service Act, 2011 to provide for EACC membership in NCAJ.	EACC is a key actor and a major stakeholder in the administration of justice sector.
H. Proceeds of Crime and Anti-Money Laundering Act, 2009		
102.	Section 2 (definition of 'authorised officer'): Insert new subsection to read <i>'an investigator duly appointed under the Anti-Corruption and Economic Crimes Act, 2003'</i>	<ul style="list-style-type: none"> • Identifies corruption as a major predicate offence for money laundering in the Kenyan context. • Recognizes EACC as the principal State agency in the fight against corruption. • Avails anti-money laundering tools and mechanisms in the statute to EACC. • Cures the existing overlaps in functions between the Asset Recovery Agency and EACC in respect of proceeds related to corruption and economic crimes.
103.	<p>Asset Recovery Agency: There should be a comprehensive review of Part IV of the Act to provide for:-</p> <ul style="list-style-type: none"> (a) Establishment of an independent Asset Recovery Agency as a body corporate with all capacities of a body corporate requisite for autonomy. (b) Leadership by an executive Director, assisted Deputy Director, as the head of the Agency with executive authority and with. (c) Procedure for appointment and removal of the Director that secures his/her independence and security of tenure (d) Establishment of a non-executive Advisory Board as an unincorporated body with membership serving on a part time basis. (e) Meetings and procedure of the Board. (f) Funding and accounting. 	<ul style="list-style-type: none"> • This amendment delinks the Asset Recovery Agency from OAG&DOJ in order to give the Agency sufficient autonomy for purposes of efficiency and effectiveness, as expected of law enforcement agencies under the Proceeds of Crime and Anti-Money Laundering Act. • It was suggested that ARA should be established and structured like the Witness Protection Agency, if it is to deliver on its mandate effectively.

I. Mutual Legal Assistance Act, 2011		
104	Section 2 (definition of Competent Authority): Insert the phrase “ <i>prosecutorial judicial authority established by law</i> ” immediately after the phrase ‘any criminal investigation agency established by law’	<ul style="list-style-type: none"> • Harmonise the list of mainstream competent authorities with the provisions of section 7(2) of the Act. • A number of provisions of the statute recognise forms of judicial assistance which means that judicial authorities are to be specifically identified as competent authorities. • Entrench the judicial authorities as a mainstream competent authority in the statute.
105	Delete Section 3 and replace therefor the following: <i>‘The forms of international assistance set out in this statute shall be carried out in accordance with the provisions of the international treaties, conventions and agreements that bind Kenya, where such provisions are non-existent or do not suffice, the provisions of this law.’</i>	<ul style="list-style-type: none"> • Has similar effect and meaning as the subsisting section 4 but is less winding with greater clarity as to purport and import. • Expressly acknowledges primacy of negotiated treaties (whether bilateral, multilateral and any supplementary agreements/arrangements) binding on Kenya such as UNCAC in the subject matter of international assistance as the main authoritative texts. • Avoids the necessity of amendment of the law to accommodate negotiated treaties and ratified international instruments. • Complies with Article 2(6) of the Constitution of Kenya. • Reduces the risk of disparate interpretation.
106	Delete Section 4 and replace therefore the following: <i>“Nothing in this Act shall be construed as prohibiting, nullifying or negating offence-specific agreements for mutual legal assistance negotiated or entered into between Kenya and the requesting State or between specialized competent agencies in Kenya and in the requesting State.”</i>	<ul style="list-style-type: none"> • Provides for clear legal basis for innovative ways of direct cooperation between competent authorities. • Acknowledges the need for innovative forms of cooperation between competent authorities as the specialized area of law enforcement may demand • Recognises, and facilitates, the developing bilateral and

		<p>regional arrangements between Governments and also between specialist enforcement agencies dealing with matters such as security regulation, corruption or drug-trafficking.</p> <ul style="list-style-type: none"> • Appreciates that varied socio-economic dynamics unique to specific offences call for tailor-made field-specific forms of international cooperation and assistance for greater efficiency and effectiveness. • It declares that the law in no way prevents the full use, and active development, of other forms of co-operation where circumstances make that desirable.
107	<p>Insert additional sections to transpose and harmonise provisions of Part XII of the Proceeds of Crime and Anti-Money Laundering Act (on international assistance) to accommodate mechanisms of international assistance provided for in sections 114 to 120 of the said Act.</p>	<ul style="list-style-type: none"> • There is need to consolidate, harmonise and unify available statutory provisions on international assistance under one principal statute. • Incorporate all available forms of assistance in a single legal text. • Simplify and avoid confusion often associated with referencing across statutes • Minimises the risk of disparate interpretation
J. Commission on Administrative Justice Act, 23 of 2011		
108	<p>a) Section 2 (1) Section 2 be amended by inserting the following new subparagraph immediately after subparagraph (d) “(e) fair administrative action within the meaning of Article 47 of the Constitution”</p>	<p>Section 2 of the CAJ Act defines “fair administrative action” which is also the subject of Article 47 of the Constitution yet it does not make reference to Article 47.</p>
109	<p>Section 44 be amended by inserting the words “or declare the person ineligible to hold public office” immediately after the word “authority”.</p>	<p>It is important for the Ombudsman (CAJ) after having concluded an investigation or inquiry and found a Public officer guilty of gross violation of the constitution or the law, to be able to make such a recommendation and also</p>

		keep a Register of such persons so that they are not unknowingly appointed to other offices within the Public Service.
110	Section 30 is amended by deleting paragraphs (b), (d) and (h).	The law is clear on who exclusively investigates criminal offences and conduct and no body or authority can interfere unless with the express authority of the law. Paragraphs (b) (d) & (h) are, therefore, of no relevance.
111	51A Inquiry into complaints:- The Commission may inquire into matters raised in the correspondence referred to in section 51.	It would be superfluous for CAJ to receive correspondence from prisoners and persons in mental institutions and fail to inquire into the complaints raised. This is just for the avoidance of doubt since it is clear that CAJ is supposed to react to the correspondence.
112	51B Certification of prosecutors The Director of Public Prosecutions may Gazette Officers of the commission who are Advocates of the High Court as prosecutors for purposes of prosecuting offences under this Act.	Since the CAJ Act provides for offences, it is prudent for the same to be expeditiously dealt with since the object of the Ombudsman office is to enhance efficiency. If the prosecution of such offences is left entirely to the Director of Public Prosecutions, the process would be lengthened thus defeating the objective of the Act.
113	51C Enforcement and non-compliance (1) The Commission may make a determination and provide a time frame for compliance therewith. (2) The commission may upon request and for good reason extend the time for compliance. (3) If upon expiry of such period there is no compliance the Commission Chairperson may issue a certificate of compliance for registration by the Registrar of the High Court. (4) If within 21 days of registration of the certificate the person or entity cited does not challenge the determination in the High Court, the Registrar shall enter judgment in accordance with the certificate and issue a	Address the issue of enforcement and non-compliance with the determinations of CAJ.

	Decree which shall be enforced in the manner provided for under the Civil Procedure Act.	
114	<p>51D (1) The Commission may make a determination provide a time frame for compliance therewith.</p> <p>(2) The commission may upon request and for good reason extend the time for compliance.</p> <p>(3) If upon expiry of such period there is no Compliance the Commission Chairperson may issue a certificate of compliance for registration by the Registrar of the High Court.</p> <p>(4) If within 21 days of registration of the certificate the person or entity cited does not challenge the determination in the High Court, the Registrar shall enter judgment in accordance with the certificate and issue a Decree which shall be enforced in the manner provided for under the Civil Procedure Act.</p>	Experience has demonstrated that public officers being aware that the decisions of the Commission are non-enforceable often ignore to implement the decisions of the Commission. This makes it difficult for the Commission to offer effective remedial action and thus leaves a complainant in whose favour a complaint has been resolved frustrated. Some form of enforceability is essential so as to realise the mandate granted to the Commission.
K. Government Contracts Act, Cap. 25		
115	<p>Insert a new paragraph 4A to read as follows:</p> <p><i>“3A (1) Notwithstanding the provisions of any other law, no contract entered into with the Government shall be secured through corrupt conduct”.</i></p> <p><i>“3A (2) The following clause shall be inserted in every Government contract: “If it is established that the contractor bribed a public officer or offered any form of benefit before, during or after the conclusion of the contract, the contract shall be rendered null and void and that the Government shall be under no obligation to honour any term or condition in the contract”.</i></p>	To give caution to contractors as well as any person entering into contract with the Government or a public entity that the contracts will be rendered null and void if it is established that in the contracting process the contractor bribed a public officer or offered any form of benefit before, during or after the conclusion of the contract. Consequently, the Government shall be under no obligation to honour any term or condition in the contract, and further, the Government, through EACC, may initiate proceedings towards the recovery of any benefit so obtained.

L. Public Audit (Amendment) Bill, 2014		
116	<p>Powers and functions: Insert a new subsection 9(1)(aa) to read as follows:-</p> <p><i>“share information with appropriate law enforcement authorities if in the cause of an audit the Auditor General considers that such information discloses reasonable grounds to suspect fraud or corrupt conduct”</i></p>	<ul style="list-style-type: none"> • Recognises the Office of the Auditor General as a key actor in the fight against corruption. • Enables the Office of the Auditor General to provide real-time sharing of information with other relevant law enforcement agencies, such as EACC, regarding potential criminal matters they may notice while conducting the audit function. • Facilitates timely action against any persons suspected of corruption and economic crime.
117	<p>Information on bank accounts: Amend section 22 by adding the following proviso to subsection (3)</p> <p><i>“22(4) Provided that where the Auditor General, in exercise of powers under this section, establishes that money belonging to a public body has been fraudulently or wrongfully paid into a person’s account, the Auditor General shall immediately share the information with the relevant law enforcement agencies”.</i></p>	<ul style="list-style-type: none"> • Enables the sharing of information on bank accounts, with relevant law enforcement agencies.
118	<p>Offences: Insert a new paragraph 60(2) to read as follows:</p> <p><i>“60(2a) Provided that nothing in this section shall be construed to constrain the Auditor General from sharing information of fraud or corruption with the appropriate law enforcement authorities”.</i></p>	<ul style="list-style-type: none"> • Removes any prohibition on the part of the Auditor-General, on the sharing of the information with relevant law enforcement agencies.
M. Public Procurement and Asset Disposal Bill, 2014		
119	<p>Review the Public Procurement and Asset Disposal Bill, 2014 to provide for more offences under proposed section 177:</p> <p>Insert the following new subsection (l) to (r):-</p> <p><i>l) Inappropriate disposal of assets.</i></p>	<p>Prescription of more offences on procurement issues.</p>

	<p>m) Failure to have an approved procurement plan by the procuring entity.</p> <p>n) Failure to comply with statutory reporting requirements to the Authority.</p> <p>o) Varying or amending procurement or disposal contracts beyond stipulated limit.</p> <p>p) Failure to recruit competent staff (procurement professionals) to discharge the procurement function.</p> <p>q) The wilful or negligent use of a procurement method without satisfying the conditions for its use.</p> <p>r) Breach of the rules of specific procurements/skewed technical specifications.</p>	
N. Controller of Budget Bill 2015		
120	<p>Powers and functions: Under section 4 (1) insert a new paragraph (b) to read as follows:-</p> <p><i>“(ba) share information with appropriate law enforcement authorities if in the cause of monitoring, evaluation, reporting and making recommendations, the Controller of Budget considers that such information discloses reasonable grounds to suspect fraud or corrupt conduct”</i></p>	Provide requisite legal underpinning for the Office of the Controller of Budget to share relevant information with law enforcement agencies.
121	<p>Provide for timelines for Parliamentary debate over reports by Controller of Budget: Insert the following new section 7A to read as follows:</p> <p><i>“7A. Parliament shall consider the reports under sections 6 and 7 above not later than 30 days after the reports have been introduced with a view to approving them, with or without amendments.”</i></p>	Provide for timelines for Parliamentary debate over reports by Controller of Budget.

O. High Court Organization and Administration Bill, 2015

<p>122</p>	<p>Amend the Bill to provide for the establishment of an Anti-Corruption and Economic Crimes Division of the High Court to try complex corruption and economic crimes, serious fraud and money laundering cases including recovery of proceeds of these crimes based on the following criteria:-</p> <ul style="list-style-type: none"> • value of alleged loss; • complexity of the case e.g. having cross-border perspectives or involving multiple laws; • character of fraudulent scheme; • impact or extent of loss; • profile of personality or office involved; • public interest; or • Other similar consideration. 	<ul style="list-style-type: none"> • Proposed establishment of an Anti-Corruption and Economic Crimes Division of the High Court. • This category of organised crimes presents unique and complex issues that require specialized skills at investigation, prosecution and adjudication stages. • There will be greater effectiveness when technical assistance, sensitization and training are accorded to Judges serving in the specialised Division alongside other specialised units in the criminal justice system. • There is need to match the specialised units at investigative and prosecutorial levels. • There is need to allocate more resources to address this category of crimes granted their deep negative socio-economic impact. • Corruption cases arising from major scandals are serious and complex and often involve multiple jurisdictions. This calls for adjudication before a judge. • The trend in other jurisdictions is that complex anti-corruption and economic crime cases are tried before superior courts e.g. Botswana, South Africa, Uganda, Nigeria and Malaysia. A specialized Division of the High Court with original jurisdiction to hear serious and complex corruption and economic crime cases will avoid the delays occasioned by accused persons going to the High Court with Judicial Review applications and constitutional references that end up delaying the prosecution of corruption and economic crime cases. In the event of a conviction the appellant will have a
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		chance to be heard on both facts and law by the Court of Appeal.
P. Proposed False Claims Act		
123	A new legislation should be enacted to provide for private persons to institute suits (<i>qui tam</i> actions) for recovery of loss incurred in Government contracting and illicit acquisition of wealth through corruption and/or other offences. The legislation should domesticate the principles of <i>qui tam</i> actions where the plaintiff (whistle blower) is entitled to a quantifiable share (between 15% to 25%) of the penalty imposed or amount recovered by or for the Government on account of assisting in the prosecution of the wrong doing or recovery of the loss. The legislation should provide for the procedure of these suits in line with the Constitution of Kenya and international best practices.	<ul style="list-style-type: none"> • Brings on board an innovative strategy for enlisting private sector participation in the fight against corruption beyond government-based institutions. • The incentive of legitimate private gain (reward) for fighting corruption makes the legislation practical and the strategy's success sustainable over the long term. • There is minimal cost, if any, in the implementation of this legislation. • It bridges the enduring institutional capacity gap by enlisting the citizen in the fight against corruption. • The legislation will give a statutory underpinning to public-spirited litigation as a legal mechanism for the recovery of loss incurred by the public through corrupt conduct as well as recovery of illicitly-acquired assets. • The ubiquitous nature of the widened accountability base is a potent deterrence from engaging in corruption and other acquisitive offences and therefore an effective and efficient preventive measure.

APPENDIX "II": GAZETTE NOTICE NO. 2118 OF 30TH MARCH, 2015

31st March, 2015

THE KENYA GAZETTE

there is need for continuous sensitisation of the citizenry on the current and emerging global challenges such as climate change and other disasters to build their resilience and preparedness.

v. *Scale up awareness creation on current and emerging changes in management of public affairs*

386. The citizenry should be sensitized to discard retrogressive cultural practices and other practices that harm the environment. Further, advocacy for transforming the public service into service-oriented and people-focused organisation should be scaled up. In addition, MDAs need to step up public participation and involvement in project planning, implementation, monitoring and evaluation.

vi. *Application of research for socio-economic development*

387. There is need for the Government to step up research funding and application of research findings to enhance research-based socio-economic development.

Commitments

388. After highlighting the challenges and the corresponding recommendations and in order to facilitate efficient and effective realisation of national values and principles of governance, the Government commits to:

a) **Ensure full implementation of the commitments made in the 2013 President's Report**

389. The Government shall continue fast tracking through the National Assembly, the approval and adoption of the policies on national values and principles of governance, and national cohesion and integration respectively. The Government shall also fast-track the conduct of a baseline survey on national values, and initiate a mechanism for implementing the findings to enhance the promotion of national values. The findings will guide the formulation of a short, medium and long term policies and strategies for promotion of national values and principles of governance. In addition, the Government shall facilitate continued review of the education curriculum to incorporate national values and principles of governance.

390. Further, the Government shall enhance mainstreaming of national values and principles of governance in all sectors of the public service. The Government shall also continue to undertake training, sensitisation and civic education for all institutions and members of the public to promote awareness on the constitutional provisions on national values and principles of governance. The Government shall continue to undertake audits of legislations, policies and institutional frameworks to ensure adherence to article 10 of the Constitution.

b) **Enhance budgetary allocation for promotion of national values and principles of governance**

391. The Government shall ensure adequate budgetary allocation for effective implementation of programmes, projects and activities for the promotion of national values and principles of governance.

c) **Continuous formulation and review of policies, enactment and review of legislations and regulations to operationalise Article 10 of the Constitution**

392. The Government shall continue to facilitate policy formulation and review, enactment and review of legislations to ensure the full operationalisation of Article 10. In addition the Government shall meet the constitutional timelines for development of legislations relating to the promotion of national values and principles of governance.

d) **Enhance collaboration between and among National and County Governments to facilitate continuous and seamless transition to the devolved system of Government**

393. The National Government shall continue, through established institutions and frameworks, to engage County Governments and facilitate the transfer of resources, assets and functions to the Counties as stipulated in the Constitution. In addition, the Government shall support the Counties to develop the necessary infrastructure to accommodate newly devolved functions.

e) **Facilitate deepening and continuous capacity building on national values at both levels of Government**

394. The Government shall in partnership with County Governments avail the necessary resources to facilitate continuous capacity building

on national values and principles of governance. be made to the values carriers and drivers identified in Paper No. 8 on National Values and Principles of Governance to create public awareness and appreciation of the provisions of Article 10 of the Constitution through various training and advocacy programmes. In addition, the Government shall step up the President's reporting process on national values and principles of governance and design a comprehensive communication strategy.

f) **Enact legislation to operationalise Article 10 of the Constitution**

395. The Government shall review laws and regulations and make necessary amendments and regulations to give effect to the provisions of Article 10, particularly provide for enforcement measures on national values and principles of governance.

Develop innovative ways of improving public service to actualise specific values

396. The Government shall continue to identify and develop innovative ways of enhancing public service delivery standards and welfare of Kenyans. In this regard, the Government shall extend the *Huduma* Centres and upgrading of informal settlements to all parts of the country.

GAZETTE NOTICE NO. 2118

TASKFORCE ON THE REVIEW OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR FIGHTING CORRUPTION IN KENYA

APPOINTMENT

IT IS notified for general information of the Attorney-General of the Republic of Kenya, in consultation with relevant stakeholders in the fight against corruption, that a Taskforce to review the legal, policy and institutional framework for fighting corruption in Kenya, comprising the following members:

The Attorney-General—(Chairperson)

Members:

Office of the Chief Justice, the Judiciary;
Chairman, Ethics and Anti-Corruption Commission;
Director of Public Prosecutions;
Chairman, Commission on Administrative Justice;
Chairperson, Kenya Law Reform Commission;
Auditor-General;
Controller of Budget;
Inspector-General of Police;
Director-General, National Intelligence Service;
Director-General of the Public Procurement Regulatory Authority;
Director of Criminal Investigations;
Ag. Director, Financial Reporting Centre;
Ag. Director, Assets Recovery Agency;
Ag. Director, Mutual Legal Assistance Central Authority;
Ag. Director, National Anti-Corruption Commission;
Committee Secretariat.

Joint Secretaries:

John Kithome Tuta,
Mary M. Wairagu (Ms.),

- The term of the taskforce is a period of sixty days. The Attorney-General may extend the term of the taskforce to more than sixty (60) days.
- The terms of reference for the taskforce shall be:
 - review the legal, policy and institutional framework for fighting corruption in Kenya;
 - propose appropriate reforms to the legal, policy and institutional framework for fighting corruption and promote integrity;
 - propose appropriate amendments to various legislative provisions with a view to strengthening the legal and institutional framework for fighting corruption;
 - examine the organisational structures of the relevant agencies with a view to providing clear separation of policy and operational roles of such entities;

- (e) consider and propose appropriate mechanisms for collaboration and co-operation among the institutions involved in the fight against corruption;
 - (f) consider and propose appropriate mechanisms for preventing and combating corruption in the devolved system of Government and in the management of devolved funds;
 - (g) consider the role of Non-State Actors, such as religious organisations, civil society, media, and the private sector in the fight against corruption;
 - (h) consider and propose appropriate institutional arrangements for training and capacity-building on anti-corruption, ethics and integrity for key anti-corruption agencies and other public officers generally;
 - (i) identify international or regional best practices in the fight against corruption;
 - (j) consider proposals for technical assistance for the institutions involved in preventing and combating corruption;
 - (k) prepare a report on the necessary legal, policy and institutional reforms necessary for effective fight against corruption; and
 - (l) carry out such other functions as may be necessary or incidental to the foregoing.
4. In the performance of its tasks under paragraph 3, the Task Force :
- (a) shall consult with key stakeholders in the fight against corruption, such as: the Ethics and Anti-Corruption Commission; the Office of the Director of Public Prosecutions, and the Judiciary, among others;
 - (b) shall hold such number of meetings in the places and at such times as the Task Force shall consider necessary for the proper discharge of its functions;
 - (c) may co-opt any person(s) as it may consider necessary or expedient for the proper performance of its functions;

(d) may consider reports of past or on-going initiatives towards enhancing the legal, policy and institutional framework for fighting corruption;

(e) may use reports prepared pursuant to the review of implementation of international instruments that Kenya is a State Party to, such as: the United Nations Convention against Corruption, and the African Union Convention on Preventing and Combating Corruption;

(f) may cause to be carried out such studies or research as may inform the Taskforce on its mandate;

(g) may have all powers necessary or expedient for the proper execution of its functions, including the power to regulate its own procedures; and,

(h) may create committees or sub-committees to expedite the discharge of its tasks.

5. The Secretariat of the committee:

The Secretariat of the Committee shall be provided by Office of the Attorney-General and Department of Justice, and shall be responsible to the Taskforce for—

(a) providing appropriate background briefing to the Taskforce;

(b) policy interpretation, developing and implementing the programmes and activities of the taskforce;

(c) preparing the reports of the taskforce and disseminating any information deemed relevant to the taskforce, and;

(d) undertaking research and liaising with the relevant Government departments and any other institution or stakeholders in the fight against corruption in order to gather relevant information necessary for informing the Taskforce.

Dated the 30th March, 2015.

GITHU MUIGAI,

Attorney-General,

Office of the Attorney-General and Department of Justice.

APPENDIX "III": INAGURAL ADDRESS BY TASK FORCE CHAIRPERSON

KEYNOTE ADDRESS BY PROF. GITHU MUIGAI, EGH, SC, ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA/CHAIRPERSON OF THE TASK FORCE AT THE INAUGURAL MEETING OF THE TASK FORCE ON 8TH APRIL, 2015, AT THE AG'S CHAMBERS, NAIROBI



OFFICE OF THE ATTORNEY-GENERAL AND DEPARTMENT OF JUSTICE

ADDRESS BY

PROF. GITHU MUIGAI, EGH, SC

ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA

DURING

THE INAUGURAL MEETING OF THE TASK FORCE ON THE REVIEW OF THE LEGAL, POLICY, AND INSTITUTIONAL FRAMEWORK FOR FIGHTING CORRUPTION IN KENYA, HELD AT

THE AG'S CHAMBERS, 1ST FLOOR BOARDROOM, NAIROBI

WEDNESDAY, 8TH APRIL, 2015 AT 8.30 A.M.

**Distinguished Members of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption,
Members of the Secretariat;
Ladies and Gentlemen.**

It is with great pleasure and contentment that I extend a welcome to you all, to the inaugural Meeting of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya. Looking around the table you, I see who is who in this country in terms of legal, policy and institutional responsibility for fighting corruption, in one way or the other. This, in my view, is a strong indicator that it is no longer business as usual to do with the fight against corruption. To paraphrase Chinua Achebe in his famous work, *Arrow of God*, a toad does not run out in broad daylight unless something is after its life.

Ladies and Gentlemen,

The seriousness with which the Government has taken up the fight against corruption needs no emphasis. We have all witnessed unprecedented steps towards purging the Government of State officers and public officers suspected of corruption. To buttress this point, allow me to quote the words of His Excellency the President in his *State of the Nation Address*, delivered in Parliament on 26th March, 2015, when he said in no uncertain terms that there will be zero tolerance to corruption in the Government:

“In view of the oath of office that I took (as the President of this Republic), let it be known that today I draw the line. No one will stand between Kenya and what is right in the fight against corruption and other monstrous economic crimes.”

And as we all know, His Excellency’s address has since been adopted by Parliament. Subsequently, numerous State officers and public officers, including four (4) Cabinet Secretaries and the Secretary to the Cabinet have had to “step-aside” pending the conclusion of investigations by the Ethics and Anti-Corruption Commission (EACC) into the allegations of corruption or other forms of impropriety levelled against them. EACC is expected to conclude those investigations within sixty (60) days.

Ladies and Gentlemen,

Kenya has been on the war path against corruption since independence. In fact, the fight against corruption predates the independence of the country, granted that the Prevention of Corruption Ordinance was enacted in 1956, meaning that corruption was still a big issue during the colonial era of the history of this country. Nonetheless, this should not make us assume that corruption is impossible to eradicate! Indeed, some of the serious efforts made towards combating corruption, especially since 2002, evince the fact that it is possible to eradicate corruption or to reduce it to insignificant levels.

It goes without saying that a lot of ink has been poured towards developing appropriate interventions aimed at fighting corruption at the national, regional and international levels. This shows that corruption is a multi-faceted problem which requires a multi-pronged approach to dealing with the phenomenon. At the national level, we have enacted a number of anti-corruption laws, such as: the Anti-Corruption and Economic Crimes Act; the Public Officer Ethics Act; the Mutual Legal Assistance Act; the Leadership and Integrity Act; the Ethics and Anti-Corruption Commission Act, and the Proceeds of Crime and Anti-Money Laundering Act, among others.

In terms of the institutional arrangements for fighting corruption, we are happy to observe that our Constitution, through Chapter Six (Leadership and Integrity) has elevated the fight against corruption beyond the ordinary legal and policy realm. It is noteworthy, for instance, that our dedicated anti-corruption body (EACC) has now been entrenched in the Constitution, through Article 79, thereby securing the body against the usual frivolous challenges over its constitutionality.

Besides EACC, the Government has put in place and continues to revamp other institutions that have a key role to play in the fight against corruption, such as: the Office of the Director of Public Prosecutions; the Judiciary (especially through its institution of Special Magistrates); the National Anti-Corruption Campaign Steering Committee; the Assets Recovery Agency; the Financial Reporting Centre; the Public Procurement and Oversight Authority; the Mutual Legal Authority Central Authority; the Office of the Auditor General, and the Efficiency Monitoring Unit, among others.

Beyond our national borders, Kenya has played an active role towards supporting the emerging global and regional onslaught against corruption. It is in that context that Kenya took the bold step of being the first country in the world to sign and ratify the United Nations Convention against Corruption (UNCAC), when it was opened up for signature and ratification in Merida, Mexico, on 9th December, 2003. In the same vein, Kenya was among the first African countries to sign up to the African Union Convention on Preventing and Combating Corruption, following its adoption in Maputo, Mozambique, in July, 2003. I am pleased to note that Kenya is at the tail end of its review of UNCAC implementation. Certainly, the outcome of the review will be of much interest to the work of this Task Force. I am sure the Task Force will also be pleased to note that Kenya is working with other Partner

States of the East African Community towards the development of an EAC Protocol on Preventing and Combating Corruption. We will continue to co-operate with other countries to ensure that corruption is wiped from the face of the earth, in all its facets.

Ladies and Gentlemen,

Despite the laudable initiatives we have put in place towards fighting corruption, it cannot be gainsaid that corruption still remains a major bottleneck to provision of goods and services in the country, in many sectors of the economy. Perhaps it is right for us at this juncture to ponder why corruption remains malignant notwithstanding all these good laws and institutions. Well, the answer to this question is the *raison d'être* of the establishment of this Task Force. Be that as it may, we must admit that as a nation, as a government and as institutions charged with the fight against corruption, there is some disconnect between the existence of the good anti-corruption laws and institutions, and the enforcement of our anti-corruption instruments. At the same time, in a number of global corruption perception surveys, Kenya is routinely ranked as one of the most corrupt countries in the world. Of course we do not agree with most of these findings, but they obviously point to a problem that we have to grapple with. This, therefore, calls for serious introspection into some of these issues, with a view to proposing appropriate interventions. I am sure the Task Force will have time to interrogate these problems.

Ladies and Gentlemen

Turning to the main purpose of this meeting, I would like us to remind ourselves of the instructions given to me by His Excellency the President through his *State of the Nation* address to Parliament on 26th March, on this pertinent question over the fight against corruption. Among other things, the President gave me a directive to –

- (i) Liaise with the Council on Administration of Justice to focus on co-ordination within the Justice, Law and Order Sector. The Council must ensure the efficient and speedy processing of anti-corruption cases, including hearing such cases on a daily basis; and
- (ii) Review the legislative and Policy Framework to ensure the effective discharge of Constitutional imperatives related to integrity.

In line with that directive, and after consultations with various stakeholders, I have constituted this Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption, with a view to ensuring that the directives issued are not only implemented timely but that the outcome of the review will engender a good governance infrastructure that not only cherishes zero tolerance to corruption and also enhances ethics and integrity in the Public Service.

As some of you may be aware, my Office together with the Ethics and Anti-Corruption Commission and other stakeholders, have been working on a National Ethics and Anti-Corruption Policy. I am informed that by next week, we will have a draft that can be subjected to stakeholder validation processes. While the proposed Policy is expected to provide a long-range policy framework for fighting corruption as envisaged under the Second Medium Term Plan for Kenya Vision 2030, there is need for some quick wins over the issue of the legal, policy and institutional framework for the fight against corruption, hence the establishment of this Task Force. Thus, we have a good opportunity to come up with quick wins even as we anticipate the completion of the policy and its adoption.

Our Task Force has been given an assignment which we need to accomplish within sixty days, with a possibility of an extension for a further sixty days. Needless to say, our work will dovetail into the on-going Policy-development initiative so as to ensure harmony in the outcome of the two processes. We will also consider the outcome of other processes, such as the Country Review Report on Kenya's implementation of UNCAC, with a view to enriching

our analysis and recommendations. At an appropriate time, we will engage with members of the public and key stakeholders in the fight against corruption, in accordance with the dictates of public participation spelt out in the Constitution.

Ladies and Gentlemen,

Recalling that the mandate of this Task Force is time-bound, we must clearly understand what is required of us by His Excellency the President and the people of Kenya. First we must assess the efficacy of the legal, policy and institutional framework for fighting corruption and make recommendations where necessary for purposes of improvement. Secondly we must interrogate the anti-corruption chain, from investigations to adjudication, with a view to ensuring that unnecessary bottlenecks are removed. We must also ensure that any loopholes which merchants of graft have hitherto exploited are sealed once and for all.

At the end of the day, some meaningful outcomes expected from the Task Force, such as: an improved legislative framework; better co-ordinated institutional framework; support to the policy development process in terms of resources and more importantly goodwill among others. However, as a meeting of equals I do encourage that we all hold quick consultative discussions towards unpacking the terms of reference and determining the expected outcomes in a participatory process.

Ladies and Gentlemen,

In view of the foregoing, my proposal is that we need to act fast and set a timetable or work plan for purposes of executing our mandate. We need to quickly identify key stakeholders and begin to engage them early. The Secretariat must be fully established as a matter of urgency. We must also identify the resources required and secure them early. This Task Force must not be slowed down by any uncertainty midway due to a failure to plan ahead. Sixty days or two months is an extremely short time especially if left to inefficiencies in time and workload management.

I have no doubt that each of us has the necessary capacity to assess the current affairs and mood of the nation. We must appreciate the task at hand and promise total commitment to this process. It is my hope that by the time the sixty days of the EACC investigations recommended by the President, we must, as a Task Force, be ready with reforms to the legal and institutional framework for fighting corruption. On its part, I am sure the Judiciary will put in place the necessary measures for handling the high volumes of cases which may be filed by the Office of the Director of Public Prosecutions following the 60-day notice given by the President.

Ladies and Gentlemen,

In conclusion, I would like to observe that Kenya's commitment to the fight against corruption is not a pious platitude but a deep seated belief that unless checked, corruption can threaten the very foundation of the state and compromise the realisation of our national goals and the fruits of our independence. For us to deal decisively with some of the pressing issues of our country today, such as insecurity, terrorism, unemployment, we must all support this timely opportunity of reviewing the legal, policy and institutional framework for fighting corruption, with a view to creating a better Kenya, for the benefit of our generation and our posterity.

With those few words, it is now my singular honour and duty to inaugurate the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption, and to wish you fruitful deliberations.

Thank you.

Prof. Githu Muigai, EGH, SC

ATTORNEY-GENERAL

APPENDIX "IV": LIST OF INSTITUTIONS THAT SUBMITTED MEMORANDUMS TO THE TASK FORCE

The Task Force received and considered memorandums or representations from the following institutions:-

- 1) The Presidency
- 2) Ministry of Defence
- 3) Ethics and Anti-Corruption Commission (EACC)
- 4) National Police Service
- 5) Independent Electoral and Boundaries Commission (IEBC)
- 6) Commission on Administrative Justice (CAJ)
- 7) National Intelligence Service (NIS)
- 8) Office of the Director of Public Prosecutions (ODPP)
- 9) Public Service Commission (PSC)
- 10) Teachers Service Commission (TSC)
- 11) Central Bank of Kenya (CBK)
- 12) National Anti-Corruption Campaign Steering Committee (NACCSC)
- 13) Kenya Law Reform Commission (KLRC)
- 14) Assets Recovery Agency (ARA)
- 15) Office of the Auditor General
- 16) Office of the Controller of Budget
- 17) Public Procurement and Oversight Authority (PPOA)
- 18) Financial Reporting Centre
- 19) Witness Protection Agency
- 20) Office of the Attorney-General and Department of Justice
- 21) Central Bank of Kenya
- 22) The Judiciary
- 23) Parliament
- 24) The Financial Reporting Centre (FRC)
- 25) The Assets Recovery Agency (ARA)
- 26) The Council of Governors
- 27) The Kenya Law Reform Commission (KLRC)
- 28) The Public Service Commission (PSC)
- 29) Commission for the Implementation of the Constitution (CIC)
- 30) Kenya Leadership and Integrity Forum (KLIF)¹⁸⁴
- 31) Law Society of Kenya
- 32) Transparency International (TI-Kenya)
- 33) Association for Citizens Against Corruption
- 34) Society for International Development (SID)
- 35) Civil Enlightenment Network Kenya
- 36) Community Organization Practitioners Association of Kenya
- 37) International Institute for Legislative Affairs
- 38) Africa Centre for Open Governance
- 39) Article 19
- 40) Kawangware Paralegal Trust

¹⁸⁴ The Kenya Leadership and Integrity Forum (KLIF) is composed of 14 sectors composed of:- The Executive Sector; the Legislature Sector; the Ethics and Anti-Corruption Commission (EACC); Labour Sector; the Education Sector; the Civil Society Sector; the Media Council Sector; Professional Organisations Sector; County Governments Sector, and the Religious Organisations Sector (the Kenya Conference of Catholic Bishops (KCCB); the National Council of Churches of Kenya (NCCK); the Evangelical Alliance of Kenya (EAK); the Supreme Council of Kenya Muslims (SUPKEM), and the Hindu Council of Kenya, among others). There is a proposal to have a representative of Constitutional Commissions and Independent Offices.

- 41) Nairobi Good Governance Coalition
- 42) Parliamentary Information Network
- 43) Vigilance Project Kenya
- 44) Ufungamano Joint Forum of Religious Organisations
- 45) Justice Committee, PCEA Loresho Parish, Nairobi
- 46) Africa Youth Trust (AYT)
- 47) Parliamentary Initiative Network (PIN)
- 48) Inuka Kenya
- 49) Nairobi Good Governance Coalition
- 50) Kenyan Section of the International Commission of Jurists (ICJ-Kenya)
- 51) Centre for Governance and Development
- 52) Anglican Development Services
- 53) Others (anonymous).