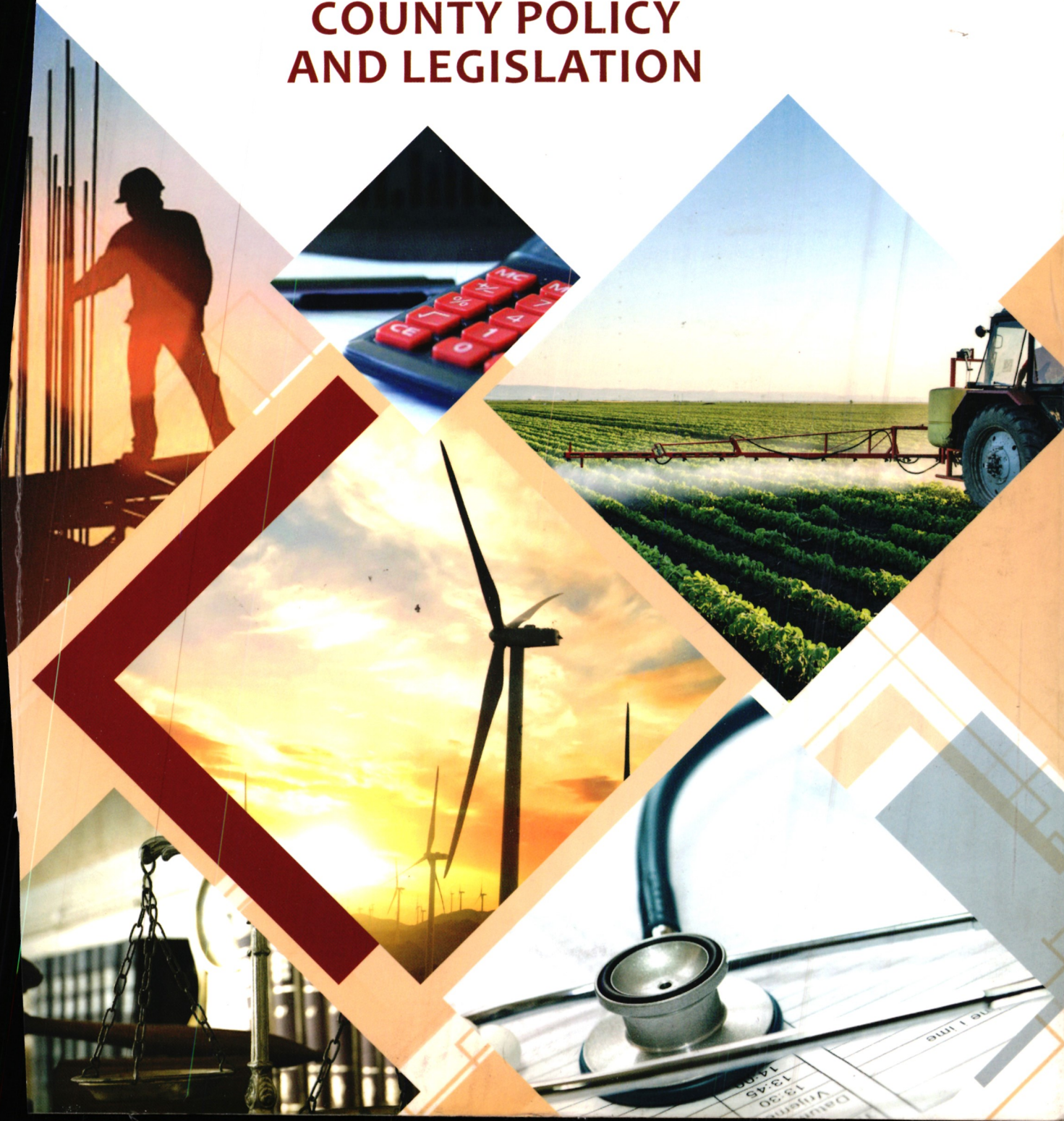




Council of Governors




REPORT ON THE AUDIT OF NATIONAL AND COUNTY POLICY AND LEGISLATION



10/1/19

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REPORT ON
THE AUDIT OF NATIONAL AND
COUNTY POLICY AND LEGISLATION

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Abbreviations & Acronyms

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CARA	County Allocation of Revenue Act
CoG	Council of Governors
KLRC	Kenya Law Reform Commission
CARA	County Allocation of Revenue Act
SAGA	Semi Autonomous Government Agency
WDF	Ward Development Fund
ICT	Information and Communications Technology
NLP	National Land Policy
EPC	Export Promotion Council
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
KENAS	Kenya Accreditation Service
CFSP	County Fiscal Strategy Paper
NFNSP	National Food Nutrition Security Policy
KHSSIP	Kenya Health Sector Strategic Investment Plan
CS	Cabinet Secretary
FMCA	Forest Management and Conservation Act
IDLO	International Development Law Organization
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
KARLO	Kenya Agricultural Research and Livestock Organization
KEPHIS	Kenya Plant Health Inspectorate Service
KLRC	Kenya Law Reform Commission
MTP	Medium Term Plan
NACADA	National Authority for the Campaign Against Drug Abuse
PFM	Public Finance Management
PFMA	Public Finance Management Act
RDA	Regional Development Authority
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

Foreword by Chairman, Council of Governors



In the year 2010, Kenya promulgated a new Constitution which introduced a two tier system of governance: the National Government and forty-seven (47) County Governments. The Fourth Schedule of the Constitution assigns thirty-five (35) functions to the National Government under part one (1) and fourteen (14) functions to County Governments under part two (2). Devolved functions primarily focus on service delivery to the citizens. County Governments have been bestowed with both legislative and executive authority to facilitate the performance of their functions and exercise of their powers.

It is however worth noting that despite the strides made in the country with respect to the devolved system of governance, existing and in force are still National laws that were enacted before the promulgation of the Constitution. Some of these laws undermine devolution by dint of the structures they had created and the powers they had conferred on various institutions, thereby impeding devolution's full implementation. On this premise, CoG and KLRC initiated the legal and policy audit aimed at scrutinizing National and County policies and laws with a view to establishing their alignment to the Constitution, specifically the devolved system of governance.

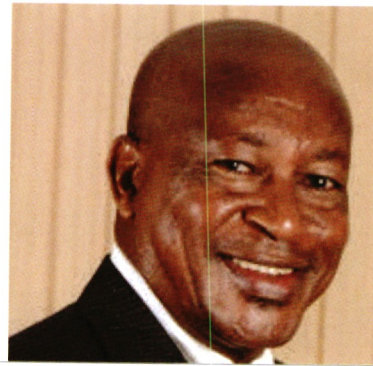
The study reveals that there are a myriad of National laws and policies that are not in tandem with the Constitution. Some of the key recommendations highlighted in the report are that some National laws need to be repealed while others require amendments in order to ensure conformity with the Constitution. For stakeholders to improve the policy and legislative environment that devolution operates in, they should read the report and collaborate in its implementation. This will ensure that both the National and County laws and policies conform to the letter and spirit of the Constitution, eventually leading to improved service delivery to the people of Kenya.

Thank you!

H.E. Hon. FCPA Wycliffe Ambetsa Oparanya, EGH, CGJ

Chairman, Council of Governors

Foreword by the Attorney General



This Report is the product of a study commissioned by the Council of Governors (CoG) and the Kenya Law Reform Commission (KLRC) across seven sectors, the key objectives of which were to audit the county government policies and legislation with the view of analysing their compliance with the Constitution, to audit all the national policy and legislation with a view of ascertaining the extent to which they conform to the devolved system of governance and to identify gaps and challenges and make recommendations for harmonization and alignment.

The sectors prioritized were Agriculture, Health, Natural Resource Management, Land and Physical Planning, Urban Development, Trade and Investment and Public Finance Management.

At this point in time, and while Kenya is still in transition from the old constitutional order to the new constitutional dispensation, it is clear from the Report that there are significant challenges around the extent of compliance with the laid down constitutional, legal and policy frameworks with respect to governance at both levels of government that need to be addressed. The Report provides the general trends that need to be tackled in the quest for compliance with the constitutional framework. Some of the notable findings include ambiguities in legislation, persistence of the old order in terms of laws, policies and practices across all sectors under review, inadequate consultation and cooperation between the two levels of government that can support and facilitate holistic development of laws and policies and a dearth of capacity to facilitate effective development of laws and policies that are clear, coherent, comprehensive and compliant with applicable constitutional provisions.

The Report has been enriched by the generous, earnest and thoughtful insights by sector experts through a peer review process. Further, the involvement of the stakeholders in reviewing the initial reports provided invaluable input in exploring together the serious topics that surround our common governance goal in addition to extensive discussion with the national and county government officials, civil society organizations, and representatives of the community-based organizations and networks that deal with sectoral governance issues.

As stated above, I wish to reiterate that this Report presents a comprehensive audit of the national and county legislation and policy approach and reveals the gaps and challenges that need immediate attention in the process of developing sufficient and responsive laws and policies that will actualize the devolved system of governance and the country's economic blue print, Vision 2030.

I wish to take this opportunity to sincerely thank the members of the team for their meritorious and sincere effort in writing this enlightening Report. My heartfelt gratitude also goes to the stakeholders and sector experts for their tireless efforts and enriching contribution and co-operation which led to the successful completion of the Report.

P. Kihara Kariuki

Attorney-General



Foreword by Chairperson, Kenya Law Reform Commission



Devolution is one of the hallmarks of the Constitution of Kenya, 2010. Devolution has not only improved the economic and social welfare of people in many places, (some of which were traditionally marginalised), but has, to a great extent, increased the democratic space in our country, since the people are now part of the decision-making processes. As a country, we have indeed overcome several challenges and milestones in a bid to make the devolution dream a reality.

The Kenya Law Reform Commission (KLRC) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 and is mandated to keep under review all the law and recommend its reform by undertaking research and comparative studies relating to law reform as well as related legislative impact assessments. The Commission also provides advice, technical assistance and information to the national and county governments with regard to the reform or amendment of any branch of law. The execution of this mandate includes undertaking a detailed audit of all the existing pieces of legislation, policies and administrative procedures and harmonizing them with the Constitution.

The Council of Governors (CoG) conducted a baseline survey which revealed that most of the laws in respect of key devolved functions were largely not compliant with the Constitution of Kenya, and key devolution Articles including Articles 173, 174 and the Fourth Schedule to the Constitution which demarcates the functions to be undertaken by the national and county governments. As a consequence of the survey findings, the Commission in partnership with COG undertook an audit of the national and county policies and law across seven devolved sectors. The purpose of the audit was to analyse national and county policies and legislation to determine their compliance with the Constitution with particular reference to devolution.

The Audit Report is one among the initiatives that we hope will help policymakers and relevant institutions in their efforts to entrench devolution. The Report focuses on seven devolved sectors namely: Health, Public Finance Management, Agriculture, Trade and Investments, Land and Physical Planning, Urban Development and Natural Resource Management as provided in the Fourth Schedule to the Constitution.

The Report documents the findings of the audit process in the identified seven sectors. It provides an analysis of the national and county policies and legislation and identifies the gaps and challenges with these instruments of governance. It further outlines recommendations for harmonization and alignment which will inform the success of counties in implementing devolution and will ensure the achievement of the collective aspirations of Kenyans, given the critical role of devolution in our current dispensation. The publication of this Report is a culmination of a highly participatory and consultative process in line with the constitutional requirements of public and stakeholder participation and engagement.

Through this Report, the Commission and CoG will spearhead and undertake the proposed policy and legislative reforms in partnership with the relevant sector Ministries, Departments and Agencies (MDAs). The successful implementation of the Report therefore calls for a coherent and cross-sectoral approach and a coordinated response across all levels of government, private sector and other non-state actors. Towards this end, all MDAs at both levels of government are expected to work closely together to make the proposed recommendations a reality. Finally, in publishing this Report, the Commission and CoG reaffirm their unwavering commitment and support to ensure conformity with the Constitution and respect for devolution.

I would like to thank all those who contributed to the development of the Report and subsequent finalization in one way or the other.

Thank you very much.

Mbage Ng'ang'a

Chairman KLRC



Acknowledgements

The development and finalization of this Report benefited from the contribution of various institutions and individuals. Various stakeholders including Ministries, Departments and Agencies (MDAs) at both levels of Government, the Private Sector, Non-State Actors, Parliament and the Office of the Attorney-General were consulted and their views considered. The stakeholders interacted with the Draft Report and gave their practical position on the issues raised. We sincerely thank them all for their invaluable contribution.

The audit process that culminated into development and publication of this Report was made possible through the generous financial support of the United States International Development (USAID) through the Agile and Harmonized Assistance to devolved Institutions (AHADI) and the Danish International Development Agency (DANIDA) through the International Development Law Organization (IDLO), the United Nations Development Programme and the World Bank. We are forever grateful to Ms. Waceke Wachira, USAID-AHADI Chief of Party and Mr. Romualdo Mavedzenge, IDLO Kenya Country Director, and their respective committed teams for their patience especially during those times when processes slowed down.

We acknowledge the excellent work done by the core technical committee comprising Ms. Joan Onyango (KLRC), Ms. Rosemary Njaramba (CoG), Ms. Zipporah Muthama (CoG), Mr. Justice Gatuyu (KLRC), Ms. Mukami Kibaara (CoG) and Ms. Christabel Wekesa (KLRC) which laid the foundation for the development of this Report. The Technical Committee incorporated the Office of the Attorney General & Department of Justice, Senate, IGRTC and Ministry of Devolution and ASALs whose input we sincerely appreciate. It is through their enthusiasm, hard work and commitment that we credit the accomplishment of this mission. We especially thank the staff of KLRC and COG (the joint secretariat of the Technical Committee) for their dedication and tireless efforts in ensuring successful completion of this Report. Special mention must go to the KLRC Chairman, Mr. Mbage Ng'ang'a who at various points was personally involved in the audit process.

We commend Dr. Conrad Bosire and the team of sector consultants namely: Prof. Kameri Mbote, Dr. Collins Odote, Mr. Peter Wanyama, Mr. Gabriel Ndung'u, Ms. Catherine Mumma, Ms. Rhoda Njuguna, Mr. Peter Mwangi, CPA Paul Otsola, Mr. Victor Odhiambo and Dr. Wilson Songa, for the exhaustive research in the policy and legal frameworks. They worked tirelessly with the technical committee to constantly revise, edit and improve the contents of this publication. It is through this effort that we have this comprehensive Report.

Finally, we are indebted to the people of Kenya for according us the opportunity to serve and being the reason we continue to evaluate ourselves as a Country.

Thank you!

Ms. Jacqueline Mogeni, MBS
CEO, Council of Governors

Mr. Joash Dache, MBS
CEO/Secretary, KLRC

Council of County Governors

The Council of Governors (CoG) is a non-partisan organisation established under Section 19 of the Intergovernmental Relations Act (IGRA 2012). The Council of Governors comprises of the Governors of the forty-seven Counties. Main functions are the promotion of visionary leadership; sharing of best practices and; offer a collective voice on policy issues; promote inter-county consultations; encourage and initiate information sharing on the performance of county governments with regard to the execution of their functions; collective consultation on matters of interest to county governments.

CoG provides a mechanism for consultation amongst county governments, share information on performance of the counties in execution of their functions, facilitate capacity building for Governors, and consider reports from other intergovernmental forums on national and county interests amongst other functions. The vision of the Council of Governors is to have prosperous and democratic counties delivering services to every Kenyan.

Kenya Law Reform Commission

The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 (the Act). Presidential assent was given on 14 January 2013 and the Act came into force on 25th January 2013. The Commission has a statutory and ongoing role of reviewing all the law of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution of Kenya. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the Constitution. The third mandate is found in the County Governments Act, No. 17 of 2012 which requires the Commission to assist the county governments in the development of their laws. This is also a requirement found in the Act.

The Act grants the Commission a body corporate status and the necessary autonomy to enable it discharge its mandate as envisaged under the Act. The Commission is wholly funded by the Government but welcomes support from its partners.

Before the enactment of the Act, the Commission operated as a Department within the Office of the Attorney-General before being moved administratively to the Ministry of Justice, National Cohesion and Constitutional Affairs in 2003.

Executive Summary

Introduction

The Council of Governors (CoG) and the Kenya Law Review Commission (KLRC) commissioned a study of law and policies across seven sectors with three main objectives:

- » To conduct an audit of County policies and legislation with a view to analysing their compliance with the Constitution;
- » To conduct an audit of all National policy and legislation with a view to examining to what extent they conform to the devolved system of governance; and
- » To identify the gaps and challenges in the above and propose remedies available for harmonization and alignment.

The seven sectors that were chosen for analysis are:

- » Health
- » Public Finance Management
- » Agriculture
- » Trade and Investments
- » Land and Physical Planning
- » Urban Development
- » Natural Resource Management

This report presents the findings from the seven sectors.

Methodology and approach to the Audit

First, the basis or anchor upon which the analysis was carried out is the Constitution of Kenya 2010. The thrust of the Constitution of Kenya 2010 was to disperse economic and political power from the centre to 47 county governments across the country. The constitutional framework upon which this dispersal is based formed the basis of analysis of the 7 sectors. The Constitution distributes responsibilities between the two levels of governments through the Fourth Schedule to the Constitution. The Constitution provided for a two phases of transition (2010-2013 and 2013-2015), to enable alignment of systems of to the two-tiered system of governance. The constitutional framework calls for a consultation and cooperation in the performance of functions between the two levels of government. To reify this constitutional framework, primary legislation, such as, the County Government Act and the Intergovernmental Relations Act were put in place to guide implementation of devolution. The constitutional, legal, and policy frameworks provided an anchor upon which the sectoral analyses were carried out. The main objective was to consider the extent of compliance with the laid down constitutional framework.

Secondly, using the normative (constitutional and legislative) yardstick above, the sectoral audit entailed a review of documentation (mainly legislation and policy documents) in the identified sectors. Accordingly, content analysis was carried out for laws, policies, administrative guidelines, sectoral plans, and cases that have come before court on various relevant matters. The products of this stage of the study were sectoral reports whose content was based on the review of documentation.

Thirdly, the initial drafts of the sectoral report were subjected to a peer review process, which involved sector experts. The peer reviewers provided a quality assurance check on the reports and provided feedback on gaps and areas for further research.

Finally, the study entailed involvement of stakeholders in the review of the initial reports based on inputs of stakeholders. Regional hearings were held to discuss the sectoral reports and one national stakeholders' forum to validate the sectoral reports. Participants at the stakeholders' forums included: national and county government officials from the respective sectors, civil society organisations, and representatives of community based organisations and networks that deal with sectoral governance issues.

Findings:

General Trends

- » **Ambiguities in the constitutional framework** need to be addressed in order to facilitate the development of coherent laws and policies across the sectors. While the Constitution provided for two transition phases (from 2010 to 2013 and 2013 to 2015) for unbundling and clarifying government competencies at the two levels, this goal was not achieved.
- » There is a **persistence of the old order** (laws, policies, and practices) across all the sectors reviewed. In all the sectors, the majority of the laws applicable pre-date the current Constitution and this means that the new roles of the county governments have not been taken into account in the text of these laws and policies.
- » There is space for clarification of the ambiguities above through consultation and cooperation between the two levels of government. However, another major finding is that there is **inadequate consultation and cooperation** between the two levels of government that can support and facilitate a holistic development of laws and policies at both levels of government. While formal structures exist, some of which are provided for by law and existing policies, they have not been used to clear the challenges of development of laws and policies for both levels.
- » In some instances, laws that are passed at the national level contradict each other and this reveals low levels of coordination, even among players within the same level of government. A glaring example of this is the contradictory and confusing provisions in the laws relating to land (see Chapter 5). A more effective mechanism of cooperation between the sectors and the levels of government can contribute to more harmonious legislation and policies.
- » Finally, the audit review reveals a dearth of capacity at both levels of government to facilitate the effective development of laws and policies that are clear, coherent, comprehensive and compliant with the applicable constitutional provisions. Accordingly, a major recommendation from this report is the systematic growing of capacity of national government sectoral bodies and the county departments to enhance the capacity to develop laws and policies that can actually facilitate the pursuit of the respective mandates without some of the challenges highlighted above.

Specific (sectoral) Trends, Findings, and Recommendations

Some of the specific findings from the sectoral analyses are pinpointed below.

Health

- » **All** the national laws and regulation relating to health should be urgently reviewed to align them to the Constitution. This will assist in facilitating better understanding and compliance by national and county staff with the devolved system of governance.
- » County governments need to put in place county implementation frameworks (County policies, laws, regulations, guidelines) for the health sector which will better guide county staff to deliver improved health services to the citizens. Specifically, county executives need

support with Legislative Drafting to enable them come up with sufficient and responsive Bills to actualize devolution .

- » The ongoing reviews of the **Health Act** should be carried out simultaneously with that of the **Public Health Act** with a view to repealing the **Public Health Act** and including its provisions in the **Health Act**.
- » There should be a harmonization of laws, policies, and regulations in order to ensure that fees and other charges paid for licensing/ regulating health facilities are not excessive. E.g. Amendments to the Kenya Medical Practitioners and Dentist Board regulations require counties to pay fees annually.
- » Any amendment bill on any of the reviewed laws that may be pending before parliament (e.g. the Miscellaneous Amendment Bills) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation in line with the constitution.
- » The laws and legal notices establishing parastatals in the health sector should be reviewed and relevant inter-governmental consultations held on how the institutions with mandates that include county functions can be re-structured if they are not wound up.
- » The laws affecting the licencing and registration of health personnel need to be clarified to indicate the role of county governments in regard to health professionals noting that the regulation of professionals is a national government function while counties are employers of professionals and providers of licences to facilities that provide county health services. Furthermore, regulatory services should be decentralized in order to ensure effective supervision of health service provision across the country.
- » Now that the constitution contemplates the implementation of provision of ratified international treaties, it will be important for the drafters of laws at the national and county levels to factor these provisions in the laws.

Public Finance Management

- » A review of sector laws and policies should address the issue of the budget cycle during election years. Given that elections are held in August, it is necessary that the budget cycle begins earlier in the preceding financial year so as to ensure that the budget is passed before the August election.
- » Laws and policies should be revised to provide for a clearer and more certain process of public participation in the management of public finances
- » There is a need for certainty in the schedule of disbursements to counties. Delays in the disbursements occasion disruption of services and salary delays in counties
- » There should be a remedy to counties where there is a delay in the passing of the County Allocation of Revenue Act (CARA). It is suggested that counties should be allowed to access up to 50 percent of allocations where there is undue delay in finalising the CARA
- » Counties should develop regulations and measures to ensure adherence to county budget estimates and ceilings in actual county expenditure. There should be adherence to the County Fiscal Strategy Paper (CFSP) and the County Medium Term Plan (MTP)
- » The law should be amended to provide more time for the counties to digest the Budget Policy Statement as this is critical to the planning and budgeting for county resources
- » The proposed law on the Ward Development Fund should provide for a bottom-up planning and utilisation of the fund in order to make it a truly grassroot fund. The level or amount of fund should also be rationalised vis-à-vis the mainstream funding from the county governments.

Agriculture

- » While a number of laws have been repealed in the sector, a majority of the relevant legislation to the sector require an overhaul for compliance with the Constitution.
- » The Ministry in-charge of Agriculture has many institutions whose mandate overlaps with county governments. The recommendations of the 2013 Parastatal Taskforce should be reviewed and applied to the agricultural sector in order to restructure and rationalise the roles played by the numerous Semi-Autonomous and Autonomous Government Agencies in the Sector (SAGAs) in the sector.
- » Furthermore, there is a need to relook, in a holistic manner, the functions performed by the SAGAs vis-à-vis the role of counties in the Constitution. The Agriculture Sector is one of the sector whose functions are mainly devolved and performed at the county level and this should be reflected in the policy, legal and institutional arrangements of the sector.
- » Development of sector policies provides a space and opportunity for negotiating functional boundaries for concurrent function if any and achieving coherence in the sector. A number of policies have been proposed and these should be developed on the basis of consultation and cooperation.
- » It is important that all laws and policies are developed on the basis of Vision 2030, the country's economic blueprint as well be alive to devolution. This is especially important for agriculture, which is the country's largest economic sector.

Trade and Investments

- » The Trade Sector lacks a legislation that guides the development and growth of the sector with a view of bringing together all related trade legislations at the National level to central body that coordinates the implementation of the Trade Policy.
- » It is recommended that all the parastatal institutions established under Legal Notices (eg. Kenya Accreditation Service (KENAS) and Export Promotion Council (EPC) should be reviewed and be established under Acts of Parliament.
- » The Public Private Partnership Act, 2012 should be reviewed to ensure make it easier for both National and County Governments to finance huge infrastructural development projects.
- » Any Amendment Bill on any of the reviewed laws that are pending before Parliament (eg. Micro and Small Enterprises) Bill, (Senate bill No. 12 of 2015) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation.
- » A number of key National legislation (eg. Special Economic Zones Act, 2015 and Export Processing Zones Act, Cap. 517) the responsible National Government agencies should work with County Governments to review the legislations in a view of providing the roles of each level of Government.
- » The majority of the National legislation do not cater for County Government representation in the Boards and Committee structures yet the legislation cover important trade and investment issues affecting Counties.
- » Any National Policies pending (eg. National Investment Policy) should be reviewed conform to the CoK, 2010 and then subjected to public participation.

Land and Physical Planning

- The Physical Planning Act requires a fundamental review in order to reflect the extensive post-2010 changes.

- » The Physical Planning Bill does not adequately reflect the changes brought by the current Constitution.
- » The Community Land Act does not reflect the roles of the county governments and the National Land Commission, yet these bodies have substantive roles to play in the administration of community lands.
- » Address the inconsistencies and contradictory provisions in the Land Registration Act, Community Land Act and the Land Adjudication Act

Urban Development

- » The National Land Policy (2009) should be reviewed to provide for the role of the National Land Commission and county government in urban land use planning and policy.
- » The National Urban Development Policy 2016 should be reviewed to incorporate provisions of Article 67 of the Constitution (the role of the National Land Commission). The policy should also have the input of the county governments .
- » The National Housing Policy should be reviewed to include devolution arrangements and specifically recognise the role of counties in substantive areas of policy implementation. Specific areas include: slums and informal settlements, rural housing, land use planning and management, estate management and maintenance, etc.
- » Similarly, the National Slum Upgrading and Prevention Policy should include the role of counties in ensuring proper human settlements and housing.
- » The National Spatial Plan (2015 – 2045) should be revised to incorporate constitutional arrangements regarding urban planning and development, especially as they relate to county governments and the role of the National Land Commission.
- » The Urban Areas and Cities Act should be reviewed to provide more clearly on the roles and limits of National Government, county government entities, and the National Land Commission on issues of urban planning and development.
- » The Urban Areas and Cities Act should provide for and facilitate, in a clearer manner, inter-county planning and financial services.
- » The Physical Planning Act (PPA) of 1996 should be overhauled to take into account the existing governance arrangements and post-2010 regimes for physical planning .

Natural Resource Management

Forests: Forest Conservation and Management Act 2016

In the Forestry Sub-sector, the laws and policies should recognise the central role that counties play in conserving forests. The counties play an important role in the implementation of national policies and legislation and the legal framework governing this sub-sector should take the role of counties into consideration in the following areas:

- » **Benefit Sharing:** clear mechanism for benefit sharing of forest resources with the counties and the community.
- » **Charcoal:** Framework for sustainable charcoal regulation and alternative energy sources and livelihood mechanism.
- » **Chain of custody:** Develop a chain of custody for forest products from the community and private lands.
- » **Participation of counties in management of public forest:** Need for a framework of engaging Counties and communities in management of public forests.

Mining: Mining Act 2018

The Mining Act should be reviewed to provide for cooperation and consultation between the national government and county governments. Currently the 2016 Act provides for control rather than cooperation.

The land management aspects of mining should reflect the role of counties, especially in unregistered community lands. This is not given any recognition or treatment in the Act

- » There is a narrow Interpretation of the Article 62(1) (F) provides that minerals are vested in the national government. The Mining Act interpretation of this clause does not appreciate the fact that county governments and communities are critical stakeholders that have to buy in to a mining proposal. This narrow interpretation can be blamed for the short timelines provided to county governments and communities to object to the issuance of a mineral rights (license).
- » as well as a legislative framework that is biased towards large scale mining – to the detriment of counties and communities.
- » This has affected transparency and accountability of the provisions and institutions in the act. It has neglected artisanal and small-scale mining which have the potential of becoming large revenue sources for counties.
- » This neglect may result in serious environmental, health and safety concerns to citizen caused by concentrated artisanal mining which is poorly regulated.
- » Local content provisions in the act are investor driven and are not linked to development and capacity building plans of the counties.
- » The act suffers from an incomplete revenue management infrastructure and unclear fiscal regime.
- » Finally, counties not adequately engaged in regulation development and review. A lacuna was identified in the post legislative scrutiny mandate of the committee on delegated legislation in the National Parliament (National Assembly and Senate).
- » The mining act was developed without an approved policy to guide the sector. The policy has yet to be approved by the National Parliament which means this review was not based on a known policy baseline. To assist this process and ensure that international best practice inform the development of a financially beneficial and environmental sustainable extractive sector county governments must lobby National Government to develop and Parliament to approve an extractive sector policy that would guide extractive law which includes Mining.

Environment: The National Environmental Policy 2013 and EMCA 2015

The National Environmental Policy 2013 should be revised to incorporate the role of county governments in implementing national policies and standards as spelt out under Part 2 of the Fourth Schedule to the Constitution

- » Specific areas of involvement of county governments include:
 - Human settlements
 - Management of biodiversity
 - Energy use
 - o Efficiency and conservation
 - o Air quality

for implementing devolution) were expected to put in place essential systems to enable county governments to perform their functions.

The transition period provided an important opportunity to align governance structures and facilitate the full implementation of devolution. For instance, while the powers and functions of county governments are given through a scheme division of functions in the Fourth Schedule to the Constitution. There is a need for even a basic clarity of the nature and extent of national and county government responsibilities. There are two lists of functions in the Fourth Schedule: one for the national government, and the second for the county government. However, the Constitution also provides that functions that do not appear in any of the lists belong to the national government. Furthermore, the Constitution provides that functions that appear on both lists are concurrent and can be exercised by either level of government, subject to criteria provided under Article 191 of the Constitution.

First, the transition period was expected to provide clarity on the full extent of responsibilities as provided for in the general and vague scheme that is under the Fourth Schedule. Secondly, the two transition phases provided an opportunity to build the capacity of both levels of government to ensure the effective of handling of their respective mandates. Thirdly, the transition phase provided space for the re-alignment of institutions at both levels of government to reflect the new constitutional scheme of governance.

An important part of this restructuring is the policy and laws of both levels of government. Ideally, at the end of the second phase of transition, we should have had in place a comprehensive system of laws and policies that facilitate the constitutional mandate of both levels of government. However, as the subsequent chapters of this report demonstrate, challenges still abound. The report points to incompleteness of the transition as regards laws and policies across the different sectors examined. The seven sectors examined are: health, public finance, trade and investments, land and planning, urban development, and natural resource management.

1.2 Transition to County governance

The transition provisions in the Constitution put in place a number of measures to ensure a smooth transition to county governments. First, the Fifth Schedule to the Constitution provided a schedule of legislation that was to be enacted before the March 2013 election. These included laws on devolution and public finance. Secondly, the Constitution provided for the establishment of independent institutions to shepherd the implementation of devolution. The Transition Authority was established by enabling legislation.¹ The Constitution established the Commission for the Implementation of the Constitution (CIC) with a 5-year mandate (which commenced in January 2011) of overseeing the implementation of the Constitution, including laws and policies, for the first five years.

The TA's role was crucial; the body was tasked with clarifying national and county responsibilities², costing the functions,³ and building the capacity of national and county governments to undertake their responsibilities. The CIC, on the other hand, was tasked with vetting proposed legislation and policies to ensure compliance with the current constitutional dispensation.

However, at the end of the first transition phase, a number of laws and policies were not yet in place. Ideally, it was expected that the TA would have unbundled the Fourth Schedule and clarified the nature and extent of responsibilities for the two levels of government. In turn, this

1 Transition to Devolved Government Act (2012).

2 Section 7 (2) Transition to Devolved Government Act (2012).

3 Section 7 (2) (b).

1

INTRODUCTION

1.1 Background

The Constitution of Kenya, which was adopted in August 2010, introduced fundamental reforms to state and governance structures. At the core of this radical and fundamental restructuring is the devolved system of government, which comprises of the national government and 47 county governments that are established across the country. To each of these 47 devolved units, legislative and executive powers were devolved and vested in elected arms of government comprising the county assembly and the county executive. Indeed, Kenya's devolution has been termed as the most important post-World War II change in devolved governance after post-Franco reforms in Spain, and post-Apartheid South Africa.

In order to make concrete this two-level system of government, the Constitution guarantees resources, powers, and functions for the county governments. The Constitution provides for minimum revenue (15 percent of revenue collected nationally) to be provided to counties and lists functional areas, which county governments can exercise powers over. County governments are currently in their second term, after the August 2017 general election having gone through the first term from March 2013 to August 2017.

The objectives and purposes of devolved government are clearly set out in the 2010 Constitution. The 47 county governments are required to use their powers and resources to pursue development priorities of communities across the country. Furthermore, county governments are required to pursue development in accordance with democratically agreed priorities at the county level. The powers and resources devolved to counties are expected to facilitate national unity through recognition of local diversity. County government resources and powers have a potential to ensure socio-economic and political inclusion and thereby contribute to the consolidation of national unity. This extends to protection of minorities and marginalised communities in the counties. Finally, county governments are expected to pursue and ensure the democratic check and separation of powers to ensure accountability.

However, Kenya is emerging from a strongly centralised and unitary system of government, which as inherited from the colonial era. While there was a brief attempt (at independence) to introduce a regional system of government, commonly referred to as majimbo, the system did not last long and was dismantled shortly after its introduction. Kenya's governance structures have, therefore, always been centralised with no real devolution or sharing of powers between the centre and sub-national units.

Accordingly, the Constitution and enabling legislation provided for two phases of transition in order to put in place laws, policies, institutions, and systems to facilitate the effective implementation of devolution. The first phase commenced immediately after the promulgation of the Constitution in 2010, and lasted until March 2013 when the pioneer county governments came into place. The second phase commenced after the entry of the first county governments and lasted for three years, until March 2015. During this period, county governments (and institutions responsible



- o Noise control
- o Water and sanitation
- » EMCA to ensure effective engagement of counties in the review, supervision, monitoring and auditing of EIAs; and
- » Criteria should be provided in selection of County Environment Committee
- » EMCA is not clear on who facilitates the Committee
- » The Role of the County Environment Committee should be clear
- » The law should be clear on social safeguards

Water: Water Act 2016

The Water Act 2016 does not provide clearly for the division and alignment of functions between the national government and the county governments. The Act should be revised to incorporate the principles of devolution, clarify the relations between counties and water sector institutions, and the two levels of government. Specific issues/ roles of counties that should be clarified include: sanitation and water services, water resources management, etc.

- » The Establishment of the Water Sector Trust fund is procedural given all water funding should be channelled through the constitutional structures such as annual funding and equalisation funds.
- » Water Works Development Agencies and National Water Harvesting and Storage Authority would be taking over powers of the county governments to develop water works and infrastructure to deliver water and sanitation services, a function constitutionally assigned to the county governments. This includes the design, borrowing for financing and implementation of water works development. Secondly, county governments argue that the agencies proposed undermine the ability of county governments to establish cross county waterworks or projects through joint committees or authorities established by the counties. Article 189 (2) of the Constitution empowers counties to establish joint committees or authority to implement projects that are cross county in nature.
- » There is no representation of Counties Governments in the Water Service Regulatory Board(WASREB) although there is room for the regulatory board to work with the county governments in enforcing certain regulatory requirements including terms of service provision.
- » Water Resource Authority(WRA) being an agent of the National Government cannot coordinate the County Government this will take the powers of the county government in management of water resources, there is also no representation of the County Government on the WRA Board.
- » The Kenya Water Institute Act of 2001 should be revised to incorporate the water sector governance arrangements and specifically the role of counties .

would have laid a clear basis for legislative and policy frameworks at both levels of government, especially at the entry point of county governments.

While the laws on devolution that were specified in the Fifth Schedule were all enacted, the list did not contain all essential laws to facilitate county operations. Indeed, a number of laws, which are critical for sectoral operations were not included in the schedule or calendar of laws that were to be passed under the 5th schedule to the Constitution. Thus, county governments commenced operations in the various sectors without a clear and coherent national legal and policy framework.

The second phase of transition to devolution ended with the exit of the Transition Authority in March 2015, three years after the March 2013 general election. The objective of the second phase was to ensure that county governments have essential systems (including laws and policies) in place, to ensure service delivery and pursuit of devolution objectives. However, at the end of the second phase of transition, a number of issues (including laws and policies) remained unresolved.

First, the TA did not complete the process of unbundling powers and functions of the national and county governments, a fact that was acknowledged in the TA's exit report.⁴ In its June 2015 report, the TA noted the "slow review/ realignment of laws touching on devolved functions" and specifically "developing of a framework for to guide the analysis and performance of concurrent functions" as an outstanding issues as at the end of the term of the TA.⁵

The process of functional assignment is an important one as it offers a guiding framework for functions and powers for the two levels of Government. In terms of policy and legislative analysis, functional assists in:

- » The process of developing of policies and laws by the county governments that support implementation of their functions (devolved functions);
- » Reviewing of the constitutional conformity of existing laws within the national government;
- » Assessment of the policies and laws developed by the county government in regard to constitutional conformity and compliance with the devolved system of government; and
- » Identification of policy and legislative gaps that exists especially within county governments in the functional areas within their jurisdiction.

Accordingly, functional assignment and the corresponding legislative and executive powers forms a conceptual basis for determining constitutional compliance of policies and laws at the two levels of government. Moreover, this too facilitates to identify areas within the agricultural sector where county government have legislative and executive powers, but they are yet to engage in the process of policy formulation and enacting of the requisite legislation for devolved functions. Likewise, the framework supports the review of the exercise of executive powers in administering services as well as implementing laws; county laws or national government laws where there is a requirement of their implementation by the county governments.

While the TA transferred certain functions to counties via three gazette notices, components of the functions transferred were not clear and this still created a problem of ambiguity. An assessment of implementation of county functions, by the Commission for the Implementation of the Constitution (CIC) in August 2015, noted this particular issue. The CIC report observed that certain functions were "not being implemented by county governments because of lack of clarity"; the reported cited examples of betting control and licensing.⁶

4 Transition Authority, *The Status of Transition to Devolved Government*, 2014, at p.27

5 As above.

6 Commission for the Implementation of the Constitution, *End Term Report*, 122.

Accordingly, at the end of the final phase of transition, a lot of issues regarding realignment of laws and policies were left pending. Pending functions of the TA, at the end of its term, were transferred to the Intergovernmental Technical Relations Committee (IGRTC) as was provided for under section 12 (b) of the Intergovernmental Relations Act.

During this period, the Council of Governors undertook the first legal and policy audit of laws and policies in order to ascertain their compliance with the Constitution.⁷ In the first audit report, which was completed in April 2015, the CoG identified a number of gaps across 10 sub-sectors that were examined during the study:

- » Agriculture
- » Water and sanitation
- » Arid and Semi Arid Areas
- » Roads
- » Public Finance, Commerce, and Economic Affairs
- » Environment and Natural Resources Sector
- » Land and Urban Development
- » Education and Information Communications and Technology (ICT)
- » Health
- » Trade, Commerce and Investments.

In each of these sectors proposed and existing laws and policies were examined and sector-based recommendations proffered. Among the main concerns that ran across the sectors was the lack of adequate consultation between the national and county governments in the development of laws and policies of mutual concern. The institutional arrangement for collaboration and cooperation is weak or totally lacking and this created a disjointed policy-making process. The main proposal in the audit was the development of comprehensive sector plans that incorporate the views of both levels of government with regard to performance of functions, sharing of resources and responsibilities, and overall sector coordination and performance.⁸

1.3 Post-transition Phase: same challenges?

There is marked and substantial progress from the transition phase to the current phase (second term of county governments). Counties have developed and passed a number of laws and policies in various sectors. This is as a result of various capacity building measures that have led to the generally increased capacity of counties to develop laws and policies. Across the sectors examined, we have we have two broad categories of laws. First, there are laws that were passed before the promulgation of the current Constitution in August 2010. As the subsequent chapters will demonstrate, a bulk of the legislation examined in the seven sub-sectors precedes the current Constitution. While the Constitution provides that pre-2010 laws should be interpreted and applied in a manner that fits within the current constitutional dispensation,⁹ the fact that there are no express provisions that apply to the current set-up and the prevailing constitutional ambiguities have rendered this provision inoperative.

Secondly, there are laws that were passed after the promulgation of the Constitution. Within this second category, there are two further sub-categories of legislation. The first is laws that, although passed in post-2010, they were passed before the pioneer county governments came into place. Accordingly, the counties did not manage to make an input at the development stage

7 Council of Governors, 'Sectoral Policy and Legislative Analysis' (April 2015)

8 Council of Governors, 'Sectoral Policy and Legislative Analysis' (April 2015) p. 9.

9 Section 7, Fifth Schedule Constitution of Kenya 2010.

of these laws. Predictably, many of these laws have provisions that infringe on the powers and functions of county governments. The second sub-category is that of laws that were developed with the active participation of the county governments. While many of these laws have taken into account areas of shared jurisdiction between the two levels, there are a number that still have glaring gaps in terms of functional boundaries between the two levels of government.

The national government plays an important role in shaping policies in sectors. However, the development of policies is yet to be fully consultative. There are no proper structures for intergovernmental consultation in the development of policies by the national executive. Furthermore, there is no concrete avenue (except during public participation) through which counties are able to make their input in the development of national legislation. The end result is that, in some cases, we end up with national laws and policies that do not the constitutional threshold.

There are a number of laws and policies that require revision in order to align with the constitution. With regard to policies there are a number of policy documents that require revision, update, or a wholesome revision and introduction of new policies.

1.4 Cross-sectoral issues in Policy and Legislation

The Constitution of Kenya 2010 has impacted Kenya's legal and policy process in a substantial manner. First, under the previous dispensation, policy-making and law making was a centralised affair where the national executive and the unicameral legislature exercised exclusive powers over laws and policies. However, the Constitution has now carved out law and policy-making powers for the county level. However, this separation of responsibility stands alongside common constitutional goals and objectives that must be pursued harmoniously by the two levels of government. For instance, the principles and values enunciated under Article 10 of the Constitution bind all state institutions including the two levels of government. Furthermore, objectives and principles of devolved government that are listed under Articles 174 and 175 bind both levels of government.

These broad provisions translate to a need for a common and harmonious way of developing laws and policies that are applicable to the national and county levels respectively. Vision 2030 is the country's economic, social and political blueprint. It outlines the steps that the country intends to take in order to reach the desired level of economic, social and political development by the year 2030. Accordingly, the import of Vision 2030 is to lay a common basis for national and county policies and laws. The two levels of government are expected to (re)align their activities, development plans, and general governance processes towards realisation of the specific targets that have been put identified in Vision 2030. The overall goal of Vision 2030 is to make Kenya a newly industrialised country "middle income country providing high quality of life for all its citizens by the year 2030".¹⁰ The broad vision is broken down into three important components: the economic, social and political pillars that will lead to the achievement of the overall vision.

The objectives of devolved government clearly demonstrate that county governments play a central role with regard to the economic, social, and political development. Indeed, county governments are seen as important vehicles through which local development and delivery of essential services will be channelled. Ideally, the policy and law development process at both levels of government should have in place a coordination process where all plans, laws, and policies are aligned to Vision 2030.

Furthermore, the ideal position is that policies should inform the development of laws at both levels of government. In this regard, the National Government has a broad policy-making power.

¹⁰ Republic of Kenya 'Vision 2030' (2007) 1.

Accordingly, national policies and laws should provide a broad legal and policy framework for the development of county laws and policies. However, this has not always been the case. In many cases observed in the subsequent chapters, laws have been developed without the attendant policies at both levels of government. In other cases, policies and laws are developed without adequate consultation between the two levels of government. These issues happen across the sectors and the main challenges, which seem to appear across all the sectors, are briefly highlighted below.

Ambiguities in Implementation

Due to the incomplete transition highlighted above, national and county governments continue to perform functions without a clear division of responsibilities as envisaged in the Constitution. The area of concurrent functions (which can be performed by either level) for instance poses a challenge due to the uncertainty of the extent of responsibilities for counties in the shared areas.

Thus, there is confusion in national and county legislation and policy. There is a need for continuation and completion of the unbundling process in order to have clarity, as this will inform law and policy development across board. This can only be achieved through strengthened collaboration between the policy-making organs at the national and county levels.

While courts have stepped in and made pronouncements in cases or through advisories, the nature of court cases is that they do not engage in policy matters or make broad-based policies. Indeed, even where county governments have been vested certain functions through judicial determination, there is a need for broad-based policies and laws to facilitate sectoral coordination. Court cases are neither a comprehensive nor systematic ways of aligning policies and laws as this is best done through a collaborative approach by law and policy-making organs at both levels.

Inadequate consultation and cooperation

The Constitution places cooperation and consultation at the centre of the current constitutional dispensation. The only way that the two levels of government (with separate powers and resources) can pursue common constitutional objectives is through collaboration. The importance of this aspect is recognised under Article 6 (2) of the Constitution and given more substance under Article 189 of the Constitution. Counties are partners with the national government in the determination of functional boundaries. As such, the two levels of government should work closely in negotiating legal and policy frameworks.

In many of the main sectors, there are intergovernmental committees that are composed of the cabinet secretaries and the respective county executive committee members. There are many instances that county governments participate through these structures and give their inputs to laws. However, the input of counties is, in many instances, not taken when laws are finalised in Parliament. As a result, many national laws and policies are passed in a near unilateral manner. Yet, the Constitution is clear that both levels of government should consult on areas of mutual interest. The failure to give a practical effect to the concept of cooperation and consultation has affected the development of laws and policies.

Incomplete Transition and the persistence of the Pre-2010 Order

There are a number of laws and policies from the old order persist and continue in a number of sectors. The fundamental changes introduced by the Constitution require a policy, legal, and institutional restructuring in order to fit with the current constitutional precepts.

In many of the sectors, notably Agriculture, Health, Physical Planning, Trade and Investments, there are old laws that have not been revised to facilitate or reflect the new roles that county governments are playing in those sectors. In most of these cases, there has been no impetus

to revise the old laws and the persistence of the old order is evidenced by a number of laws with provisions that are unconstitutional. One of the major recommendations from this report is to have a specific review of all laws and policies in the identified sectors in order to ensure compliance with the current system of devolved governance.

Capacity

While there is growing capacity in counties, there is a constant and consistent need for capacity to match up the constitutional mandate that has been given to counties. Counties have a primary mandate to develop laws and policies to cover all areas allocated to them under the Constitution. While a number of laws have been developed, there is a mismatch between the legal and policy needs and the number of laws and policies currently in force in the counties.

Finally, laws and policies are only as useful as the matching capacities to ensure that counties are able to utilise laws and policies in order to provide concrete services and perform other functions. This calls for a holistic review of the capacity requirements of counties in order to ensure that once good laws and policies are developed, they actually facilitate the achievement of the intended benefits to county governments.

2

HEALTH

2.1 Introduction

The devolved system of government substantially altered the structures and institutional arrangements for the provision of health services in the country. The Fourth Schedule, which allocates responsibilities between the two levels of government, vested the county governments with a core role of providing basic health services while national health policies, standard setting, technical support for capacity needs and national level health services (referred to as national health referral services) were retained at the national level. Prior to 2010, the local authorities played a dismal role in public health services with only 3 to 4 larger municipalities (out of the 175 former local authorities) offering some basic health services.

More importantly, the Constitution recognised, for the first time in Kenya’s constitutional history, the fundamental right to health. Article 43 (1) provides that “every person has a right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care”. Along with the right to health, the Constitution provides for the right to accessible and adequate housing, clean and safe water, and social security, among other social and economic rights. All of these rights support the broad realisation of the right to health.

The recognition of the right to health translates the provision of those rights to a duty of the national government and the county governments levels, in accordance with the framework that is set out under the Fourth Schedule to the Constitution and the relevant Transitional Authority gazette notice that unbundles the functions in the Fourth schedule. Furthermore, even before the promulgation of the Constitution, the Country had committed itself to various regional and international human rights instruments that required state parties to implement and facilitate the realisation of the right to health. Article 2 (6) of the Constitution provides that “any treaty or convention ratified by Kenya shall form part of Kenya under this Constitution”. Accordingly, realisation of the right to health is not only a constitutional imperative but also a realisation of Kenya’s external commitments to realise the right to health.

Table 1: Regional and International Instruments on the Right To Health

Provisions Of International Instruments	Key Focus
Article 12 The International Covenant on Economic, Social and Cultural Rights (ICESCR)	<ul style="list-style-type: none">▪ Recognizes the right of everyone to the highest attainable standard of physical and mental health.
Article 5 The International Convention on the Elimination of racial Discrimination (ICERD)	<ul style="list-style-type: none">▪ Provides for non-discrimination in the enjoyment of rights including the right to public health.

Table 1: Regional and International Instruments on the Right To Health

<p>Article 5 The International Convention on the Elimination of racial Discrimination (ICERD)</p>	<ul style="list-style-type: none"> ▪ Provides for non-discrimination in the enjoyment of rights including the right to public health.
<p>Articles 10 and 12 United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)</p>	<ul style="list-style-type: none"> ▪ Shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
<p>The African Charter on Human and People rights (Banjul Charter)</p>	<ul style="list-style-type: none"> ▪ Provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.
<p>Article 14 The African Charter on the Rights and Welfare of the Child (ACRWC)</p>	<ul style="list-style-type: none"> ▪ Provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
<p>Article 24 UN Convention on the Rights of the Child (CRC)</p>	<ul style="list-style-type: none"> ▪ Recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
<p>Article 25 UN Convention on the Rights of Persons with Disability (CRPD)</p>	<ul style="list-style-type: none"> ▪ Provides for the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Implementation of the health sector reforms, in view of the new constitutional framework, requires the alignment of laws and policies to the current constitutional order. As a result, there is a need for new laws at the county level and revised or new laws at the national level. Additionally, the redistribution of functions between the two levels affects the restructuring of institutions in the health sector. This audit reviews the laws and other legal instruments establishing these institutions to ensure that to the extent that they carry out functions that have been devolved, they will need to be restructured to ensure compliance with the constitution.

The Constitution of Kenya 2010 is, therefore the primary standard for guiding the audit of the policies and legislation on Health; it is expected that the actual drafting of the revised/ amended policies and laws following the recommendations from this audit, will take on board the other relevant technical issues concerning the sector.

To guide the implementation of laws and policies, the Transition Authority developed a framework for understanding, in a greater detail, the functions transferred to counties. This is contained in a gazette notice that was published in August 2013. The details of the various functions are provided in the table below.

Table 2: County Government Functions in the Health Sector

Function	Content of functions
County health facilities	<ul style="list-style-type: none"> • County hospitals • Sub-county hospitals • Rural health centres • Dispensaries • Rural health training and demonstration centres, • Rehabilitation and maintenance of county health facilities including: <ul style="list-style-type: none"> ○ maintenance of vehicles, ○ medical equipment and machinery, ○ Inspection and licensing of medical premises including reporting.
County health pharmacies	<p>Specifications, quantification, storage, distribution, dispensing and rational use of medical commodities Provided that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a county government is not available at the Kenya Medical Supplies Authority;</p>
Ambulance services	<ul style="list-style-type: none"> • Emergency response • Patient referral system
Promotion of primary healthcare	<ul style="list-style-type: none"> • health education, • health promotion, • community health services, • reproductive health, • child health, • tuberculosis, HIV, malaria, • school health program, • environmental health, • maternal health care, • immunization, • disease surveillance, • outreach services, • referral, • nutrition, • occupation safety, • food and water quality and safety, • disease screening, • hygiene and sanitation, • disease prevention and control, • ophthalmic services, • clinical services, • rehabilitation, • mental health, • laboratory services, • oral health,

Function	Content of functions
Promotion of primary healthcare	<ul style="list-style-type: none"> • disaster preparedness and disease outbreak services. • planning and monitoring, • health information system (data collection, collation, analysis and reporting), • supportive supervision, • patient and health facility records and inventories;
Licensing and control of undertakings that sell food to the public	<ul style="list-style-type: none"> • food safety and control;
enforcement of waste management policies, standards and regulations	<ul style="list-style-type: none"> • refuse removal (garbage): <ul style="list-style-type: none"> ○ provision of waste collection bins, ○ segregation of waste at source, ○ licensing of waste transportation; • refuse dumps including: <ul style="list-style-type: none"> ○ zoning waste operation areas, ○ conducting environmental impact assessment for the siting of dumps, ○ fencing of dumps, ○ controlling fires, ○ monitoring waste.
Veterinary services	<ul style="list-style-type: none"> • coordinate and oversee veterinary services including clinical services • artificial insemination, • reproductive health management

2.2 National Policies

The national government under the new constitution is charged with the responsibility of policies and strategies definition while counties are responsible for the implementation of the same to guide the health service delivery. Aligning policies to the new constitution is vital to guide the two levels of governments in achieving national priorities in order to avoiding policy implementation failure. Policies defines the action plan and identifies the responsibilities of each level of government in order to achieve the policy set objectives. Thus, failure to articulate the policies in relation to the implementation level creates confusion and duplication of functions leading to wasted resources.

Policies also define the resources both financial and human, required to implement the policy. Hence when a policy does not articulate the process of provision and the role of the level of government that is responsible, the priorities are not well financed or supported with necessary human resources for their implementation.

In addition, policy implementation may rely on development of new systems to facilitate the implementation of the planned priorities and unlock the foreseen progress accruing from the policy implementation. Furthermore, coordination between the two levels of government allows smooth implementation, follow up, and common understanding. When such systems are not put in place due to lack of policy or strategy clarity, the two levels of government do not have an idea of what the other is doing. This makes monitoring of achievements accruing from policies and strategies from a national level impossible. If results of a policy or strategy cannot be confirmed, then the policy is deemed failed.

The purpose of audit of the policies and strategies in the health sector has been to confirm the extent to which the policies are aligned to the new constitution and identifying areas that need to be addressed ensure the policies and strategies are aligned to achieve the set objectives thus avoiding policy/strategies failure. The audit examined the following policy documents.

National policies

- » Kenya Health Policy, 2014-2030
- » Kenya National e-Health Policy, 2016-2030
- » Health Information Systems Policy
- » The National Food and Nutrition Security Policy (NFNSP) - Kenya
- » Mental Health Policy, 2015 – 2030
- » HIV and AIDS Policy, (2009)
- » National Reproductive Health Policy: Enhancing Reproductive Health Status for all Kenyans, (2007)
- » Kenya Adolescent Reproductive Health and policy, 2015
- » National Maternal, Infant and Young Child Nutrition, Policy Guidelines, 2013.

Strategies

- » Transforming Health: Accelerating Attainment of Universal Health Coverage: Kenya Health Sector Strategic and investment Plan (KHSSPI) July, 2013 –2017
- » The Kenya National Strategic Plan on Tuberculosis, Leprosy and Lung Diseases, 2015 – 2018
- » Tobacco Control and Prevention Strategy Towards Tobacco Free Kenya, 2012 – 2017
- » Kenya National Strategy for the Prevention and Control of Non-Communicable Diseases, 2015 – 2020
- » The National Cancer Control Strategy, 2017 – 2022
- » Health Sector Human Resources Strategy, 2014-2018
- » Kenya Health Sector Referral Strategy, 2014–2018.

Detailed recommendations are provided in the tables. However generally, a number of policies require complete overhaul because they are out-dated. A number need to be reviewed to clearly define the role of counties as the implementing agencies. All policies and strategies require a plan for dissemination and domestication at county level to address the specific need of each county.

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Health Policy, 2014-2030 Objective: 1. Eliminate communicable conditions 2. Halt and reverse the rising burden of non-communicable conditions 3. Reduce the burden of violence and injuries 4. Provide essential healthcare 5. Minimize exposure to health risk factors 6. Strengthen collaboration with private and other health-related sectors</p>	<ul style="list-style-type: none"> ▪ The policy complies with Devolution as it identifies the mandate of each level of government. ▪ However, it is not possible to confirm the level of implementation. ▪ There is also need to confirm the extent to which counties are aware of the policy and if they are using it. ▪ Also, it is important to establish the number of counties that have domesticated the policy to meet their unique needs and set up their priorities and investments. 	<ul style="list-style-type: none"> ▪ There are residue functions still under national government especially under the national parastatals and Sagas that need to be addressed. ▪ Such institutions include NACC, NHIF, all human resource responsible for registering and regulating human resource for health ▪ Except for KEMSA, all parastatals under the national government are not devolution compliant but they are undertaking county functions. Such organizations include NACC, the Kenya Blood Bank, Kenya Poisons Board, all bodies that register and regulate health workers. 	<ul style="list-style-type: none"> ▪ Need to review the policy at midterm to allow adjusting changes that have resulted due to deepening of devolution. ▪ Identify all parastatals that are undertaking county functions in contravention of the constitution and have them change to be inter-governmental institutions. Such parastatals include NHIF, NACC etc. ▪ All residue functions that are county functions that are performed at national levels need to be devolved.
		<ul style="list-style-type: none"> ▪ The policy is fully operationalized at national level ▪ Poor dissemination of the policy at county levels mean poor implementation due to lack of in depth understanding of objectives and orientation. ▪ It is not clear the number of counties that are aware of this policy and that have customized the policy to address issues that are unique to the counties. ▪ The policy proposes a universal health care with counties participating. 	

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya National eHealth Policy, 2016-2030</p> <p>Towards attainment of the highest standard of health through adoption and use of ICT</p> <p>Objective:</p> <p>To create an enabling environment for the</p> <ul style="list-style-type: none"> ▪ Sustainable ▪ Adoption, ▪ Implementation and ▪ Efficient use of e-health products and services at all levels of health-care delivery in Kenya. 	<ul style="list-style-type: none"> ▪ The development of the policy included participation of both national and county governments. Participation of the counties is key because 95% of health care is provided at the county levels that would benefit from elaborate eHealth systems to improve health services. ▪ Given that eHealth policy cannot be implemented in isolation, this document is anchored on the policy frameworks provided by the Kenya Health Policy (2014 - 2030), Health Information Policy (2014 - 2030), and the ICT Policy 2006. ▪ Currently, over 35 counties have at least one eHealth project with Nairobi, Mombasa and Kisumu Counties taking the lion share of the projects. Comparatively, Peri-urban Regions like Busia, Kakamega and Vihiga have a good number of eHealth projects while Counties in Arid and Semi-Arid Regions such as Turkana, Wajir, Garissa, Samburu, Marsabit and Mandera have the least number of eHealth systems and interventions. 	<p>This calls for reforming the NHIF to make it compliant with devolution but this is yet to be done.</p> <p>The policy is new as it was finalized in 2016.</p> <ul style="list-style-type: none"> ▪ To operationalize this policy and achieve intended objectives will require heavy investment both by the national and county levels. ▪ Need to define the role of fund raising because the level responsible is not clear. The policy seems to allocate this responsibility to national government yet counties also need to raise funds for county functions including for establishment of eHealth systems. ▪ The national government is lying cables establishing connectivity across towns including to hospital facilities. The role of the county in this regard will need to be clarified as it is not clear. 	<p>This being a new policy, there should be emphasis on dissemination so that counties can be clear on their roles and responsibilities especially on regulations of the systems that are already operational</p>

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix (Cont'd)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Health Information Systems Policy Guides: The Health sector in</p> <ol style="list-style-type: none"> 1. Developing and 2. Implementing an information system capable of producing quality data and information. 	<ul style="list-style-type: none"> ▪ Over 35 counties are implementing have eHealth but the ownership and implementation of the interventions/ projects are by donor partners and Non-Governmental Organisations (NGOs) raising the issue of ownership and sustainability. ▪ The policy is meant to provide a regulatory framework that provides guidance on ownership of eHealth projects. This policy will minimize duplication and fragmentation of these interventions while increasing acceptability and sustainability of eHealth conventional healthcare sector. ▪ The policy includes institutional structures that include counties showing their role in the implementation of the policy. The national government role includes capacity development and standards. 	<ul style="list-style-type: none"> ▪ Health information is collected from the lowest to the highest health facilities. Health facilities are divided between the National and County governments in accordance with each level of government mandate. 	<ul style="list-style-type: none"> ▪ Need to review the policy to align it to devolution. This will allow a two tier Health Information System (HIS) ▪ The two-tier would have overall indicators to demonstrate country's performance and progress on key health parameters that would also allow comparison with international health goals that the country has signed to:



Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>3. To capture data that shows trends on the performance and progress towards achieving the health sector's objectives.</p> <p>4. supports the availability of reliable and relevant health information, for planning and evidence-based decision on resource allocation for improved quality of health services countrywide.</p>	<ul style="list-style-type: none">▪ However, this does not allow for counties specific indicators that would mirror counties priorities	<ul style="list-style-type: none">▪ Currently data is collected from dispensaries health centers, sub-county hospitals, county referral hospitals. The data is fed into the HIS and transmitted to the national Ministry of Health .▪ The record officers are county officers but it is not clear which level of government is responsible for building their capacity, career development etc.▪ The policy is inconsistent to the following extent:▪ The policy was developed before devolution with limited consultation of counties.	<ul style="list-style-type: none">▪ The second tier/level would include county indicators to allow counties capture county specific data on priorities thus providing evidence for county decision making.▪ A review would allocate responsibility on the management including analysis and use of the data and information collected at both levels of the government.▪ Clarify the responsibility of each level on resource mobilization for system strengthening including human resource.
		<ul style="list-style-type: none">▪ The Health Information Management Systems that existed before the current policy changed only in name to HIS. The system of data collection did not change: data is primarily collected at facility level and uploaded to the electronic system and transmitted to MOH with no management at county level. The indicators are the nationally defined indicators and there is no way of measuring county specific indicators if a county wanted to gather more detailed information through the same information system.▪ MOH has retained the management role of the data collected from the counties.	

Table 3: A Review of the Applicable Health-Sector Policies Issued in a Ministerial (Order)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>The National Food and Nutrition Security Policy (NFNSP)</p> <p>Objective:</p> <ol style="list-style-type: none"> To achieve good nutrition for optimum health of all Kenyans. To increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times. 	<ul style="list-style-type: none"> The policy is fully compliant with the constitution where agriculture sector is concerned. From an agriculture perspective, counties are responding with various interventions that will ensure they are food secure. From a health perspective, the operationalization is weak. The National Nutrition Action is centralized and all projects/interventions are vertically managed from the national level. 	<ul style="list-style-type: none"> The national indicators on which data is collected and counties cannot add any specific indicators that they would apply to their priorities or vary in terms of depth of the data collected. The MOH allocated itself the role of resource mobiliser for systems strengthening both for the human resource and the technology development. Counties thus have to take what the MOH prescribes. While this allows for standardized technological development across the country, it is not clear the level that is responsible for data collection tools- data collection is still done manually at county level facilities. 	<ul style="list-style-type: none"> The policy is still very relevant to the nutrition sector hence no need for review. The Action Plan operationalizing the policy at health sector need to let counties control their functions. The current Action Plan (2012 -2017) is contrary to the constitution and is implemented with little consultation /participation of counties. County involvement in developing future NNAP is emphasized. MOH must also let counties undertake those functions that are part of county functions.

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>3. To protect vulnerable populations using innovative and cost-effective safety nets linked to long-term development.</p>	<ul style="list-style-type: none"> ▪ The Policy is still very relevant and there are many sub-policies development addressing specific areas of intervention like the food fortification, breast milk substitutes. There are also guidelines developed under the strategic objectives that need to be disseminated and availed to counties for implementation. ▪ The National Food and Nutrition Security Policy developed in 2011 is domiciled in Ministry of Agriculture but the Nutrition part is implemented by a number of Ministries including Ministry of Health for the specific nutrition interventions. At county level, the implementation of nutrition also takes a multi-sectoral approach that includes Ministries of Agriculture, Health, Education, Water and Social Protection. ▪ The policy is operationalized both at national and county levels through the National Nutrition Action Plan that is implemented through the 13 Strategic Objectives. 	<p>For example, planning for nutrition commodities and procurement of the same is a county function.</p>	

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a matrix (Table 3)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Mental Health Policy, 2015 - 2030</p> <p>Towards Attaining the Highest Standard of Mental Health</p> <p>Objectives:</p> <ol style="list-style-type: none"> 1. To strengthen effective leadership and governance for mental health. 2. To ensure access to comprehensive, integrated and high quality, promotive, preventive, curative and rehabilitative mental health care services at all levels of healthcare. 3. To implement strategies for promotion of mental health, prevention of mental disorders and substance use disorders. 4. To strengthen mental health systems. 	<ul style="list-style-type: none"> Because nutrition has in the past taken an emergency perspective, counties that have emergency interventions especially the ASAL and Semi-ASAL Counties have greater operationalized policy by making nutrition a priority and increased investments unlike counties limited or no need for emergency response. The policy has limited compliance with constitution. The policy mentions the counties only once in reference to confirming the policy will be implemented at county health facilities. It does not elaborate on the how. Organization of mental health services should be in accordance with Schedule 4 of the Kenyan Constitution : The National Government shall be responsible for health policy, the national referral health facilities, capacity building and technical assistance to the counties and disaster management. The County Health Services shall be responsible for county mental health facilities, promotion and provision of comprehensive mental health care services at all levels, emergency services and an effective mental health referral system. 	<p>Compliant to the extent it is applicable to services provide by the national government.</p> <ul style="list-style-type: none"> County hospitals provided mental health services. But this is not recognized because the major referral hospital for mental health services is under the National Government where all specialists also operate from. The Board of Mental Health that the policy entrusts with the provision of the overall oversight in mental health is a national SAGA hence has no oversight over county mental health services. The policy is operationalized at National level because the largest Mental health facility is under the national Government. The level of implementation at county level is unknown. It is not also clear whether there has been dissemination of the policy and related guidelines at county level. 	<ul style="list-style-type: none"> The policy need to recognize that the bulk of mental health services are provided by both counties government. The policy mentions counties in passing but does not elaborate how the objectives would be implemented at county level or the collaboration between the two levels of governments would be enhanced. Kenya currently has inadequate data and information on the prevalence of Mental Health, Neurological and Substance Use (MNS) in Kenya. There is need to include key indicators for mental health to facilitate tracking services and prevalence levels. Need to integrate mental health with primary health care in order to broaden services, improve access to the services and reduce stigma.

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
	<ul style="list-style-type: none"> The direct relationship between the national mental health services and the county mental health services shall be determined through the operational guidelines developed for this policy. 		<ul style="list-style-type: none"> In order to achieve the objectives of this policy, a multi sectoral approach will be necessary. The key ministries include: Education, labour, security, correctional services, children services, planning, finance, legal justice system, industrialization, agriculture. The policy proposes the amendment of the Mental Health Legislation to establish County Mental Health Councils that shall give oversight to mental health at county levels. There is need for broad based discussion to agree on functionality and implementation of the proposed councils vis-à-vis established county oversight roles on health provision. Poor financing of mental health has contributed to lack of services. There is need to have a budget dedicated to mental health both at National and County levels. Availability of data mentioned above will facilitate evidence based planning and investments including for HR. Counties need to confirm viability of establishing community health financing programmes to support mental health services. Public private partnerships and voluntary private sector participation in provision of mental health services and financing need to be encouraged.

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix (Cont'd)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>HIV and AIDS Policy, (2009)</p> <p>Objective:</p> <ol style="list-style-type: none"> Setting Minimum Internal Requirements (MIR) for managing HIV and AIDS in the workplace; Establishing and promoting programmes to ensure non-discrimination and non-stigmatization of the infected; Contributing to national efforts to minimize the spread and mitigate against the impact of HIV and AIDS; Ensuring adequate allocation of resources to HIV and AIDS interventions; Guiding human resource managers and employees on their rights and obligations regarding HIV and AIDS. 	<p>Not compliant. It focuses on the ministry instead of addressing issues of HIV at Workplace in general and especially at county levels. Policy was developed before the new Constitution and devolution.</p>	<p>The entire policy is not compliant to constitution. It is implemented at national levels across all ministries even though it focus was the Ministry of Gender, Children and Social Development</p>	<ul style="list-style-type: none"> Engage sectors that have mental health components to make targeted budgetary allocation to mental health services and programmes Develop a National strategic program on substance use prevention, treatment, care and rehabilitation. <p>(1) Need to review the policy to take into consideration changes and developments that have occurred since 2009 to address HIV/AIDS at workplace both at national and county levels.</p>

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>National Maternal, Infant and Young Child Nutrition Policy Guidelines, 2013</p> <p>Objectives:</p> <ol style="list-style-type: none"> To protect, promote and support exclusive breastfeeding for the first six months of a child's life and continued breastfeeding up to two years or beyond. To promote the timely introduction of appropriate, safe and adequate complementary foods at 6 months while continuing breastfeeding Support e- MTCT services while promoting optimal IYCF in HIV -exposed children for overall child survival Enhance optimal MIYCN in other exceptionally difficult circumstances To strengthen and accelerate family, community and health care support and mechanisms to achieve optimal MIYCN To support and enhance the provision of enabling environment for working mothers, fathers and other caregiver, both in formal and informal employment to provide optimal infant and young child nutrition To strengthen research, monitoring and evaluation systems to support policy guidance for MIYCN 	<ul style="list-style-type: none"> The policy is compliant with the constitution and in its implementation framework, the policy clearly defines responsibility of each levels of the government. <ol style="list-style-type: none"> National Level <ul style="list-style-type: none"> Provide leadership, guidance and coordination to all stakeholders providing MIYCN services. Give effect to the principles and regulatory framework of the Breast Milk Substitutes (Regulation and Control) Act, 2012 . County level <ul style="list-style-type: none"> Engage and provide oversight to CBOs, FBOs and NGOs operating in the community – strengthen coordination. Monitor the implementation of the policy across all health care levels. 	<p>To ensure standardized implementation across all counties, there is need to focus on dissemination of both the policy and guidelines and standards. There is also need to integrate the interventions of this policy with other programmes focusing on child health to achieve efficient and effective implementation.</p>	<ul style="list-style-type: none"> Need to disseminate the policy beyond the 23 ASAL and Semi-ASAL Counties . Need also to disseminate the guidelines and standards especially on breast milk substitutes. Seek to integrate the provision of this policy with maternal and child health for effective implementation.

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Transforming Health Accelerating Attainment of Universal Health Coverage Kenya Health Sector Strategic and Investment Plan (KHSSIP), July, 2013-2017</p> <p>Focus areas:</p> <ol style="list-style-type: none"> Increasing the numbers of KEPH interventions being provided across the Country (introduction of interventions as and where needed) Increasing the coverages of populations using the different KEPH interventions (scale up of intervention use) Reducing the household financial burden incurred at the point of access and utilization of KEPH services (reduce catastrophic health expenditures) 	<ul style="list-style-type: none"> The strategy is compliant with constitution. The implementation framework spells out each levels of government responsibilities. The strategy is operationalized at both levels of governance. However, the implementation of the strategy has been wanting as MOH has continued implementing county activities. For example, the maternity funds have been managed and disbursed by National MOH. The experience has been negative as counties have faced serious delays in disbursing the funds impacting negatively on service delivery. It is not clear how far the strategy has been disseminated to counties and aligned to counties' health investment plans. Some counties have moved ahead to establish financing schemes that cover their communities. Makeni is an example that is rolling a health care coverage for the poor. An example on unilateral decision from the planned investments areas under this strategy include the recently decision to have the maternity funds managed by NHIF. 	<p>The non-compliance comes with details of implementing the strategy especially under the UHC.</p> <ul style="list-style-type: none"> For UHC to succeed, counties need to understand the different methodologies and approaches that would ensure sustainability of UHC. What is its impact on counties expenditure framework - who pays for what? Time it would take for Counties to improve quality of care etc. 	<ul style="list-style-type: none"> The strategy has followed up on various investment areas identified in the MTP II. Since this strategy is coming to an end, it will be important that a new one is developed jointly with counties with a framework that ensures MOH does not continue to undertake county functions unless there is clear inter-governmental agreement. For activities delegated by either level of government, an inter-governmental agreement need to be drawn in accordance to inter-governmental relations Act. <p>While the decision is better than MOH managing the funds, there is need to ensure NHIF is an inter-governmental institution with counties, which are largest beneficiaries of NHIF services,</p>

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix (Cont'd)

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>The Kenya National Strategic Plan on Tuberculosis, Leprosy and Lung Diseases, 2015–2018</p> <p>Objectives:</p> <ol style="list-style-type: none"> Sustain the gains made over the past decade, in the context of a newly devolved health system Intensify efforts to find the “missing” cases of TB, leprosy and lung disease Reduce transmission of TB and leprosy Prevent active disease and morbidity Enhance the quality of care for chronic diseases 	<p>being members of its board to ensure they are part/influence the decision making process that impact on health services delivery at county level.</p> <ul style="list-style-type: none"> The strategy is fully compliant with the constitution. The strategy is meant to provide a smooth transition of TB management and control to county level in accordance with the constitution. The strategy identifies approaches for both national and county level in accordance with each level of government’s defined functions. The strategy implemented between 2014 and 2018 has prioritized smooth transition to the county-based systems of governance for the TB and Leprosy control programmes. This is to ensure gains made so far are not reversed as counties take up the responsibility of implementing TB and leprosy control programmes. The Strategy provide a number of approaches including articulating and documenting responsibilities for all TB activities between the two levels of government. 	<ul style="list-style-type: none"> The strategy is compliant. What need to be established is whether implementation has been undertaken as part of county functions egg inclusion of TB funds in county budgets, quantification and procurement of the nutrition commodities. Like the on-going strategy, the recommended strategy will need to include: <ul style="list-style-type: none"> Definition of financial and human resource commitments, including technical assistance and necessary commodity management support from central MOH Ensure the county and sub-county structures can support all designated activities: e.g. identify a TB and leprosy focal point for each level, take inventory and address any capacity building needs; and develop on-the-job tools and disseminate existing guidance to promote national standards. Ensure inclusion of TB and leprosy within county health plans Stakeholders mapping at all levels and all stakeholders are engaged in county planning Establish County-based centres of excellence, based on strong performance 	<ul style="list-style-type: none"> The strategy is ending in 2018. There is need to start the process of developing a new strategy to ensure there is continuity in management of TB and Leprosy control programmes. More importantly ensure continued case notification and procurement of essential commodities for TB management especially of the MDR TB by county facilities.

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
		<ul style="list-style-type: none"> ▪ Develop and implement a technical assistance and quality assurance plan through a cascade from central to community levels. ▪ The nature of technical assistance from central to county level must be expanded to build capacity for planning, advocacy, budgeting, quality assurance of labs and facilities, and data monitoring ▪ Ensure county ownership and designated funding of supportive supervision to sub-counties, health facilities, laboratories and community - based treatment partners. ▪ Promote the establishment of inter-agency coordinating committees to assist with planning, budgeting, implementing and monitoring activities. The ICCs include all partners, such as the private sector, MCH programme, CSOs and communities, at county and sub-county levels. ▪ Re-profile National MOH staff to ensure in-house capacity for: <ul style="list-style-type: none"> i). High-level policy formulation to include TB in emerging health system strategies, plans, and demand-side financing modalities including national health insurance and social protection programmes; ii). Coordination of health system structures for comprehensive program implementation by 47 counties; and 	

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix (Cont'd)

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Tobacco Control and Prevention Strategy Towards Tobacco Free Kenya, 2012–2017</p> <p>Objectives:</p> <ol style="list-style-type: none"> To develop policy, regulations and guidelines for tobacco control To advise and guide in the carrying out of research on tobacco control and development activities To mobilize and map out resource for Tobacco Control Activities To Strengthen the infrastructure and capacity of TCB To Monitor & Evaluate the Activities on Tobacco Control Initiated by the Board 	<p>The strategy is not compliant.</p> <p>The strategy provides for a Tobacco Board to advise the Cabinet Secretary for Health. This Board does not include counties or provided advise on impact of tobacco use on health.</p> <p>This is in spite of the fact that health issues arising from tobacco use are mostly felt at county level because majority of health facilities are under county management.</p>	<p>iii). Continued technical leadership and support to counties. Additional skills, particularly related to economics and statistics, are required at the Program level to enhance planning and monitoring.</p> <p>The entire strategy is not compliant to the constitution.</p> <p>The strategy was developed before devolution.</p> <p>It's operationalized at the National level and no evidence of implementation at county level.</p>	<ul style="list-style-type: none"> Need to review the strategy since tobacco use impacts on county health provision hence need to develop a new strategy with county strong participation to ensure county issues are addressed.

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya National Strategy for the Prevention and Control of Non-Communicable Diseases, 2015-2020</p> <p>Objectives:</p> <ol style="list-style-type: none"> 1. Risk factor reduction 2. Strengthening and re-orientation of the health care systems to address NCDs 3. Advocacy and community mobilization 4. Health promotion 5. Research 6. Surveillance and the creation of networks and partnerships for disease control across various sectors 	<ul style="list-style-type: none"> ▪ The strategy is compliant with constitution. ▪ The strategic implementation framework spells out each level of government's responsibilities. ▪ The strategy is operationalized at both levels of governance. ▪ As soon as counties came into being, attempts have been made to increase accessibility and affordability of services for NCDs especially diabetes and cardiovascular diseases. ▪ A lot of counties have upgraded county referral hospitals and procured equipment that would improve quality of services through improved diagnosis and investigative procedures. <p>The leased health equipment undertaken by the National government on behalf of counties is an example of attempts to improve services for NCDs at county facilities.</p>	<p>The strategy has well elaborated objectives including actions that need to be taken to achieve each objective.</p> <ul style="list-style-type: none"> ▪ Under each objective, the role of each level of government is expounded. ▪ Already counties are strengthening their service delivery systems by hiring more health workers and equipping county hospitals with the leased equipment for health. ▪ Regarding integration with other programmes and existing frameworks, some counties have embraced the community strategy and engaged community health worker. <p>Also, counties have established maternal, child, adolescent programmes that can be integrated with the NCD interventions.</p>	<ul style="list-style-type: none"> ▪ The Strategy is relevant to both counties and national government. ▪ Emphasis should be on intensified dissemination so that counties are aware and use the strategy to ensure objectives of the strategy are included in the CIDPs to facilitate county prioritizing, planning and budgeting for the NCD prevention and control activities.
<p>The National Cancer Control Strategy (NCCS), 2017-2022</p> <p>Areas of Focus:</p> <ol style="list-style-type: none"> 1. Prevention, early detection and cancer screening 2. Cancer diagnosis, registration and surveillance 3. Cancer treatment, palliative care and survivorship 4. Coordination, partnership and financing for cancer control 	<ul style="list-style-type: none"> ▪ The strategy is compliant with constitution. ▪ The strategy is operationalized at both levels of governance ▪ It has clearly defined areas of operation for both levels of governments and other relevant stakeholders that are expected to enhance services for the control of cancer. 	<ul style="list-style-type: none"> ▪ It will be important to establish the levels of dissemination and extent to which the strategy is under implementation at county level. 	<ul style="list-style-type: none"> ▪ Cancer Prevention and Control is still relatively new area of intervention. Capacity is still limited both at national and counties levels. ▪ The current strategy based on the Health policy is very new and relevant with clearly defined roles for each level of government.

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix (Cont'd)

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>5. Monitoring, Evaluation and Research.</p>			<ul style="list-style-type: none"> All le vels with responsibilities need to concentrate efforts on implementation of the strategy in order to reduce number of people developing cancer every year.
<p>Health Sector Human Resources Strategy, 2014 – 2018</p>	<ul style="list-style-type: none"> The strategy is fully compliant with the constitution. Implementation has been problematic due to many strikes that have faced the health sector since devolution The strategy has been operationalized both at the National and County levels. However, since devolution started in 2013, the health sector has faced serious labour issues with health staff going on strike many times demanding for better pay, training, standardized treatment of staff especially at county level, demands for health workers' commission and demand to return management of all HR to the national government including those at county facilities. These issues are as a result of insecurity enhanced by chaotic transition of health functions to counties including human resource working in county hospitals and administrative units. 	<ul style="list-style-type: none"> Though the strategy is compliant, there are issues with implementation. The counties have not been able to implement it fully due to counties limited human resource development and management capacity . Most of the county Boards are still weak and lack necessary capacity to manage and develop county human resources adequately. Thirdly, the recently passed health law included clauses that are not aligned to the constitution, creating more confusion. Thus, the above issues need to be addressed when developing the new strategy after 2018 . 	<ul style="list-style-type: none"> The strategy is ending in 2018 . There is need to start the process of developing a new strategy to ensure there is continuity in addressing HRH issues in a systematic and consistent manner. A clear strategy will create confidence in county systems and build county public service board capacity to manage and develop county HRH.
<p>Objectives:</p>			
<p>1. Align the development of HRH Str ategy to the Kenya Health Sector Strategic and Investment Plan, 2013 - 2017, Public Service Commission Act, 2012 and other evidence based HRH proposals, reports and assessments</p>			
<p>2. Articulate future HRH investments areas, HRH coordination mechanism in the Nation al HRH Strategic plan</p>			
<p>3. Outline implementation framework for identified HRH priorities, budgetary estimates, resource mobilization plan, monitoring and evaluation plan and tools, and the implementation structures to support implementation of the identified priorities</p>			

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Health Sector Referral Strategy, 2014 – 2018</p>	<p>Objective:</p> <ol style="list-style-type: none"> 1. Referral Strategy deals with the management of four key movements 2. Patients/client movement 3. expertise movement 4. Specimen movement for investigative purposes 5. Movement if patient information for diagnostic purposes <p>▪ Not compliant. It does not define the roles of different levels of government especially at implementation level.</p> <p>▪ The development of this strategy had started before the onset of devolution. However, it was finalized immediately after the transfer of functions to counties and it is noteworthy that it was not revised to factor explicitly county role in the referral system to strengthen the health services.</p> <p>▪ The referral system has been operationalized but not in the manner described by the Strategy.</p> <p>▪ The national government facilities particularly the National Kenyatta Hospital has complained of referrals sent from county facilities for services that could be undertaken at county level. This has been quoted as one major reason for congestion at the Tertiary facility impacting negatively on the ability of Kenyatta to provided quality services.</p>	<p>The entire strategy is not compliant to constitution. There is need to develop a new one that takes into consideration both levels of government’s responsibilities.</p>	<ul style="list-style-type: none"> ▪ The strategy is due to end in 2018 and there will be need for counties to be involved in the development of the next strategy because referral will impact on county health services. ▪ Referrals system has direct impact on county facilities’ ability to offer quality services if referral is not streamlined and prudently implemented.



2.3 National Legislation

A total 25 national laws and regulations in the health sector were reviewed. The audit reviewed the sector legislation in accordance with the Constitutional framework, and specifically the fourth schedule where health responsibilities are distributed between the two levels of government. The audit highlights any sections that are unconstitutional, obsolete or requiring alignment to the constitution. The laws reviewed are as listed below:

- » Health Act (Act No. 21 of 2017)
- » Kenya Medical Supplies Authority Act (Act No. 20 of 2013)
- » HIV/AIDS Prevention and Control Act (Act No 14 of 2006)
- » Pharmacy and Poisons Board Act.
- » Public Health Act (This one interphases with the Health Act)
- » Mental Health Act (Cap 248)
- » Anatomy Act (Cap 249)
- » Narcotic Drugs and Psychotropic Substances Act (Act No. 4 of 1994).
- » Public Health Officers (Training, Registration and Licensing) Act (Act no. 12 of 2013)
- » Kenya Medical Training College Act (Cap 261)
- » National Authority for the Campaign Against Alcohol and Drug Abuse Act (Act No. 14 of 2012)
- » The Alcoholic Drinks Control Act (Act No. 4 of 2012)
- » Human Tissues Act (Cap 252)
- » Counsellors and Psychologists Act (Act No. 14 of 2014).
- » Clinical Officers (Training, Registration and Licensing) Act (Cap 260)
- » Health Records and Information Managers Act (Act No. of 15 of 2016)
- » Malaria Prevention Act (Cap 246)
- » Clinical Officers (Training, registration and Licensing) Act (Act No. 20 of 2017)
- » National Health Insurance Fund Act (Act No. 9 of 1998).

Regulations

- » Pharmacy and Poisons Board Rules (Legal Notice No. 86 of 1957 as amended by L.N. 443/1957, L.N. 332/1958, L.N. 426/1958, L.N. 498/1958, L.N. 550/1959, L.N. 114/1960, L.N. 587/1961, L.N. 242/1963, L.N. 631/1963, L.N. 92/1964, L.N. 365/1964, L.N. 115/1968, L.N. 125/1969, L.N. 248/1969, L.N. 41/1971, L.N. 120/1984, L.N. 52/1984, L.N. 51/1985, L.N. 61/2002, L.N. 91/2004 and L.N. 191/2010)
- » Pharmacy and Poisons (Conduct of Inquiries) Rules (Legal Notice No. 52 of 1985)
- » Pharmacy and Poisons (Registration of Drugs) Rules (Legal Notice No. 147 of 1981 as amended by L.N. 142/1991 and L.N. 192/2010)
- » Pharmacy and Poisons (Control of Drugs) Rules (Legal Notice No. 180 of 1969 as amended by L.N. 247/1969, L.N. 228/1974)
- » Mental Health Act (Board Meetings) Regulations, 2000
- » Narcotic Drugs and Psychotropic Substances (Control) Restraint and Forfeiture) Regulations, 1997 (L.N. 547/1997)
- » Narcotic Drugs and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations, 2006 (L.N. 16/2006).

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
<p>Health Act Act No 21 of 2017</p>	<p>Section 6 on reproductive health rights could have incorporated more of the reproductive health rights provided in the international treaties like the Maputo Protocol as is required by Article 21 of the Constitution.</p> <p>Section 6 (1)(c) has classified difficult conditions occurring during pregnancy like ectopic, abdominal and molar pregnancy or any other condition that makes the life of the mother or child to be threatened as comprising ‘notifiable condition’.</p> <p>Section 6 (2) requires that conditions anticipated under section 6 (1)(c) be carried out by “a health professional who has been trained to manage pregnancy-related complications in women and who has obtained a license from the recognized regulatory authorities to carry out that procedure”.</p>	<p>When read together with Sections 17 of the Public Health Act that defines notifiable diseases as those that are contagious diseases this will stigmatize women.</p> <p>It will discourage health professionals from providing emergency treatment to women with pregnancy related complications.</p> <p>The section is inconsistent with Article 28 of the Constitution and related treaty provisions on the right to dignity and Section 5(2) of the Act, which provides that every person has the right to be treated with dignity, respect and have her/his privacy respected.</p> <p>This provision is discriminatory for requiring a special license that is not required of other medical procedures. It will sentence so many women because of creating special qualification for those who handle them. The provision also limits the right to access reproductive health care for many women.</p>	<p>Include the treaty provisions on reproductive health rights from ICESCR and Maputo Protocol.</p> <p>Repeal as this facilitates the violation of pregnant women’s rights to the right to privacy and to non-discrimination. The clause only services to stigmatise women with difficult pregnancies.</p> <p>Review to remove the requirement for special license for people handling pregnancies.</p> <p>Rephrase to ensure clarity and to avoid the possible interpretation that will see many women not attended.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 7 (3) provides that every medical institution that fails to provide emergency medical treatment while having ability to do commits an offence.</p>	<p>This provision violates Article 43 (2) of the Constitution that provides that “no person shall be denied emergency medical treatment”. Right to emergency medical treatment cannot be qualified in law and made subject to the ability to provide. The clause may facilitate a claw back.</p>	<p>Amend to rephrase so that every medical institution will have responsibility to either provide the treatment or refer and facilitate transfer as necessary; they must not turn away any case.</p>
	<p>Section 15 (1)(c) is vague to the extent that it mandates the national government to “ensure the implementation of the right to health specified in the Bill of Rights...”.</p>	<p>Service delivery is at the core of the Implementation of the right to health and is largely a county function; the role of the national government is to develop national policies, manage national referral services, set standards to guide implementation and give technical support. There is need for clarity through review or during implementation of this provision to ensure respect for the principle of separation of powers and the functional assignment between the 2 levels of government.</p>	<p>Section 15 (Duties of National Government) may require clarity on the role of the national government in ensuring implementation of the right to health to ensure respect for the principle of separation of powers.</p>
	<p>Section 18 (Directorates) provides for the formation of directorates and details the matters that the directorates should deal with, some of which include county functions e.g. pharmaceutical services.</p>	<p>It is essential therefore for the section to be un-bundled to ensure that the function focuses on the national government functions of standard setting and not implementation of services that are the preserve of county governments.</p>	<p>This provision should limit the roles of the directorates to functions of the national government as provided in the Fourth Schedule to the Constitution.</p>
	<p>Section 20 of the Act provides for the role of county governments in implementing national health policies and standards.</p>	<p>The section is silent on the legislative authority of county governments to ensure that counties develop county laws, policies and administrative</p>	<p>The provision should include the duty of county governments to enact own laws as provided by Article 185 of the Constitution and</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 45 establishes the <i>Kenya Health Professions Oversight Authority</i> mandated with among other functions joint inspection with other regulatory bodies.</p> <p>Section 60 obligates inspection, monitoring and evaluation of standards of performance to respective bodies provided they are not in conflict with functions of the Authority.</p> <p>Section 62 of the Act provides for the enactment of Act for: Health Products and Health Technologies.</p> <p>Section 67 (2) and (3) (<i>Procurement of Health Products and Technologies</i>) includes the classes of products that shall be procured by KEMSA and provides that KEMSA may be a first point of call for procurement of health products at county referral level respectively.</p> <p>Section 67 of the Act mandates the national government with providing guidelines for procurement, distribution and</p>	<p>procedures that give effect to the right to health.</p> <p>The existence of many bodies performing almost similar functions creates an environment of conflict and duplication of functions/roles hence imprudent use of resources.</p> <p>Reference to KEMSA in the Act indirectly applies undue pressure upon counties to procure from KEMSA without due regard for counties to be able to procure on their own.</p>	<p>Section 22 of the County Government Act.</p> <p>Regulation of professionals should be limited to one body to avoid duplication of roles. This includes repealing of the myriad of regulatory bodies enlisted in Section 60.</p> <p>There is need to advocate for the development and enactment of this law.</p> <p>Counties should be enabled to procure health products and technologies from other organizations apart from <i>Kenya Medical Supplies Authority (KEMSA)</i>, however there is need for standards to be set to ensure that the medical supplies that are purchased through KEMSA or otherwise meet the required standards.</p> <p>There is a need to implement the same.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>management of health products and technologies.</p> <p>Section 70 makes an amendment to only one section of the Public Health Act.</p> <p>Section 75 provides for the establishment of a different regulatory body to regulate the practice of traditional medicine and alternative medicine.</p> <p>Section 80 (3) provides that the Cabinet Secretary shall regulate the criteria for approval of organ transplant facilities.</p> <p>Section 85 (1) provides for the enactment of an act of parliament to establish the <i>Kenya Blood Transfusion Service</i>.</p>	<p>The section is silent on provisions of other sections of the Act which have either become obsolete or are unconstitutional to the extent that some of the provisions assign functions to the National Government that have since been devolved to the County Government by the Fourth Schedule to the Constitution including Sections 7 which establishes district health management boards; Section 15 which requires the Minister to be consulted over municipal council by-laws; Part Xiii on cemeteries and Section 151 among others.</p> <p>Section 62 provides for the establishment of a single regulatory body for regulation of health products and technologies. The establishment of two bodies undertaking functions that can be undertaken by one body is a misuse of resources contrary to Article 201 of the Constitution and is likely to cause conflicts among the two organizations.</p>	<p>Review and amend the whole of Cap 242 (Public Health Act) and not merely one provision of the Act.</p> <p>Regulation of traditional and alternative medicine should be restricted to the single regulatory body regulating health products and health technologies established in section 62.</p> <p>There is need for the Cabinet Secretary to be advised to provide regulations.</p> <p>This law should be enacted.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 86 (f) provides that the department of health shall ensure progressive financial access to universal health coverage by taking measures that include ... ensuring that all pharmaceutical and non-pharmaceutical products correspond to <i>Kenya Medical Supplies Authority</i> market prices.</p>	<p>The Act should limit the role of KEMSA to research and providing guidance to the Cabinet Secretary which would be in line with Section 4 (1) (d) of the KEMSA Act which mandates the Authority to collect information and provide regular reports to the national and county governments on the status and cost-effectiveness of procurement and the value of prescribed essential medical supplies.</p>	<p>The National Government through the Ministry should be the body with the mandate to constantly guide on market price standards for pharmaceutical products, limiting the role of KEMSA to research and providing guidance to the Cabinet Secretary on the market price standards.</p>
	<p>Section 100 (3) provides for enactment of legislation to give effect to Section 100 on the research or experimentation on minors for therapeutic and non-therapeutic purposes.</p>		<p>This legislation should be enacted.</p>
	<p>Section 104 provides for enactment of legislation on E-legislation</p>		<p>This legislation should be enacted.</p>
	<p>Section 105 (3) provides that the Cabinet Secretary shall prescribe policy guidelines on integrated comprehensive health information management system.</p>		<p>These policy guidelines should be formulated.</p>
	<p>The act fails to recognize and provide for health as a consumer right.</p>	<p>Article 46 of the Constitution provides that consumers have the right to the protection of their health.</p>	<p>Amend the Act or provide for the need for regulations to addresses Article 46 of the Constitution on the health rights of consumers.</p>
	<p>The Act is silent on the issue of establishment and operation of morgues.</p>	<p>County governments are mandated with the role of establishing and maintaining</p>	<p>Amend the Act to include a provision that mandates the National Government in</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
Kenya Medical Supplies Authority Act Act No 20 of 2013	<p>The open-ended exercise of the right to demonstrate, strike, picket by health worker without limitation has caused unnecessary loss of lives and will continue doing so if it is not limited.</p>	<p>cemeteries/morgues. However, the role of setting standards is that of National Government.</p> <p>Health services are essential services that are central to the protection of the right to life. A limitation of the right to picket and strike for health workers will assist in ensuring that lifesaving services are provided during strikes.</p>	<p>consultation with County Governments to set standards on Morgues.</p> <p>The Act should incorporate limitations on the right to demonstrate in line with Article 24 of the constitution to protect the right to life.</p>
	<p>Section 4 (1)(b) provides for the establishment of a network of storage packaging and distribution facilities for the provision of drugs and medical supplies to health institutions.</p>	<p>There is need to provide for consultation with county government to ensure the storage networks are not rendered nonfunctional by the counties if they are not in agreement.</p>	<p>Prudent use of resources should be a key consideration in the establishment of storage networks.</p>
	<p>Section 4 (1)(c) of the Act is silent on the mode of partnership between KEMSA and the counties.</p>		<p>There may be need for regulations to guide on partnerships between KEMSA and the counties and the establishment of framework with County Governments for purposes of providing services in procurement, warehousing, distribution of drugs and medical supplies.</p>
	<p>Section 4 (1)(d) provides for the authority to collect information and provide regular reports to the national and county governments on the status and cost effectiveness of procurement and distribution and value of prescribed essential medical supplies delivered to health</p>	<p>There is need for clarity on the provision to ensure that the Authority is not undertaking a county function with regards to stock status but the same is limited to stock available in KEMSA stores.</p>	<p>The provision should ensure compliance with the principles of devolution</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>facilities, <i>stock status</i> and any other aspect of supply system status.</p> <p>Section 6 (2)(g) provides among the powers of KEMSA board is to incorporate, develop and operate a division or subsidiary of the Authority for procurement, storage and supply of medical supplies to health facilities and institutions.</p>	<p>This is inconsistent with Section 67 (3) of the Health Act which provides that KEMSA shall endeavor to establish branches within each county at such locations as it may determine. The provision should ensure consistency whether it is branches or subsidiaries that are being established to provide consultation with county government to avoid competition with the counties.</p>	<p>The powers should be consistent with the Health Bill, 2017.</p>
<p>HIV/AIDS Prevention and Control Act No 14 of 2006</p>	<p>The Act uses terminologies that no longer apply in the current constitutional dispensation. For example, the use of the term “Minister”.</p> <p>Section 4 provides for the role of the <u>Government</u> in promoting public awareness in HIV and AIDS education and information through a comprehensive nationwide educational and information campaign.</p> <p>Section 6 provides that HIV and AIDS education and information dissemination shall form part of the delivery of healthcare services by</p>	<p>Review of the Act will ensure that certain terminologies such as “Minister” is changed to “Cabinet Secretary” and that the definition of “partner” complies with the Constitution article 27 in compliance with the Constitution and will ensure that the Act is not in conflict with the Health Act 2017.</p> <p>Emphasis should be drawn upon this being a function of the National Government with collaboration from the County Government in view of Article 6 and the Fourth Schedule of the Constitution to ensure separation of power as well as coordination and cooperation of the different levels of government.</p> <p>Healthcare service provision is a function of County governments hence the need to amend the provision to ensure clarity.</p>	<p>The Act requires review to amend various terminologies including Minister which no longer exists as per the Constitution.</p> <p>The section may require amendment to ensure separation of power in line with the Fourth Schedule to the Constitution.</p> <p>There is need to clarify on the role of each level of government in accordance with the Fourth Schedule of the Constitution to ensure</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	healthcare providers and the Government shall ensure training of healthcare providers’.		separation of powers.
	Section 11 (2) mandates the Minister with ensuring provision of protective equipment to healthcare providers.	Provision of protective equipment for healthcare providers depends on the function (national or county) being performed by the healthcare provider. The role of providing protective equipment is a role of county government and would vest in national government only where it relates to National Referral hospitals.	There is need for this provision to be clarified to ensure that the role of each government level is effectively undertaken
	Section 11 (3) mandates the Minister with ensuring provision of post exposure prophylaxis to healthcare providers.	Provision of post exposure prophylaxis for healthcare providers and other personnel depends on the function (national or county) being performed by the healthcare provider. The role of providing protective equipment is a role of county government and would vest in national government where it relates to National Referral hospitals.	There is need for clarity to ensure that the role of each government level is effectively undertaken.
	Section 15 mandates the Minister to ensure that facilities for HIV testing are made available.	Provision of HIV testing is a shared function of both county and national governments and not solely vested upon the Minister.	HIV testing is a shared function and Section 15 should reflect the same.
	Section 16 (1) and (2) mandates the Minister to approve testing centres and healthcare providers for testing purposes.	HIV testing is part of service delivery that is primarily carried out at the county health facilities but is also carried out at the national referral facilities and is therefore a shared function and approval of testing centres and healthcare providers is not only a preserve of the Minister. The Minister or in this regard the Cabinet	Amend to align to the functional assignment in the constitution.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 19 mandates the government to take steps to ensure available resources and access to healthcare services including essential medicines by persons with HIV.</p> <p>The Constitutional court declared Section 24 to be unconstitutional in AIDs Law Project Vs Attorney General and 3 Others [2015] eKLR Petition 97 of 2010.</p>	<p>Secretary cannot purport to approve health facilities and healthcare providers for the county governments but can do so for the national government.</p> <p>Access to essential healthcare services including access to essential medicines for persons with HIV or AIDS is a function which is shared between both the national and county government.</p> <p>The Section was found by the court to be unconstitutional for being vague and lacking in certainty.</p>	<p>Amend to reflect the responsibility as being of the national and county governments.</p> <p>Repeal the Section.</p>
Pharmacy and Poisons Board Act	<p>Section 4 (5) provides that minutes from meetings of the Board shall be entered into a minute book and, at the next board meeting be submitted to be passed as correct and confirmed by the <i>Chairman of the Board</i>.</p> <p>Section 14 provides that appeals on decisions of the Board not to register a person as a pharmacist or to deregister a pharmacist should be made to the Supreme Court.</p> <p>Sections 27 (1) and (2) provide that the decision to issue, renew</p>	<p>The decisions of the Board have a direct impact on the laws passed by the counties. Thus, these minutes should be circulated to the counties as soon as they are confirmed.</p> <p>There is only one supreme court in Kenya thus requiring persons to appeal to the <i>Supreme Court</i> does not guarantee the provision of proximate and easily accessible services in accordance with Article 174 (f) of the <i>Constitution</i>.</p> <p>In light of the transfer of county pharmacies to the counties, this function is now a county function.</p>	<p>Amend to provide that, once passed as correct and confirmed as correct, the minutes of the meetings of the Board shall be circulated to the county assemblies and executives in addition to being entered into the minute book.</p> <p>Amend to provide that appeals against a direction of the Board to delete a name from the register should be made to the High Court. Sections 15 and 16 should also be amended such that all mentions of the supreme court are replaced with High Court.</p> <p>Amend to provide that the decision to issue, renew or revoke licences shall lie with</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	or revoke licences lies with the Board.	However, the National Government still has the power to set the standards for the issuance of licenses thus it should issue regulations to guide the counties.	the county governments which shall be guided by the guidelines created by the cabinet Secretary in consultation with the Board.
	Section 28 (1), (3) and (4) provide that applications for licences to deal in poisons by persons who carry on agricultural, horticultural or mining businesses shall be made to the Board who shall then decide whether to issue, renew or revoke these licenses.	This function has been transferred to the counties thus the applications should be made to the counties. The National Government now has the function of determining the criteria that shall be used when granting, renewing or revoking a licence. Thus, it should guide the counties on the criteria to be used.	Amend to provide that applications by persons carrying on mining, agricultural or horticultural businesses for licenses to deal in poisons shall be submitted to the County governments who, guided by the guidelines prescribed by Cabinet Secretary after consultation with the Board, shall determine whether such licences should be issued, renewed or revoked.
	Section 32 (1), (2) and (5) empower the Board to receive applications for licenses to sell Part II poisons and to decide whether to issue, renew or revoke these licences.	The Act should recognise the transfer of this function to the county government and the role of the national government to give guidance to the counties on how to perform their functions.	Amend to provide that applications for a licence to sell Part II poisons shall be made to the county governments who shall, in accordance with the guidelines set out by the Cabinet Secretary after consultation with the Board, decide whether they shall be issued, renewed or revoked.
	Section 44 of the Act is silent on the issuing of rules and guidelines by the Cabinet Secretary to guide the county governments.		This section should include a provision for the Cabinet Secretary to issue guidelines to guide the counties on the criteria for granting, renewing or revoking the various licences provided for by the Act.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
<p>Pharmacy and Poisons Board Rules (Legal Notice No 86 of 1957 as amended by L.N. 443/1957, L.N. 332/1958, L.N. 426/1958, L.N. 498/1958, L.N. 550/1959, L.N. 114/1960, L.N. 587/1961, L.N. 242/1963, L.N. 631/1963, L.N. 92/1964, L.N. 365/1964, L.N. 115/1968, L.N. 125/1969, L.N. 248/1969, L.N. 41/1971, L.N. 120/1984, No. 52/1984, L.N. 51/1985, L.N. 61/2002, L.N. 91/2004 and L.N. 191/2010).</p>	<p>The Section 3 (4) provides that where the Board denies an application for a license to import, the applicant may appeal the decision to the Minister.</p> <p>Section 4 (3) provides that where the Board denies an application for a license to export drugs or poisons, the applicant may appeal the decision to the Minister.</p> <p>Section 14 (5) provides that the person in hospitals who is charged with the inspection of the storage of poisons as well as the records regarding the issue, use and dispensing of poisons shall submit their reports on these matters to the registrar of the <i>Pharmacy and Poisons Board</i>.</p>	<p>Article 152 of the Constitution provides that the Cabinet shall now consist of Cabinet Secretaries Not Ministers.</p> <p>Article 152 of the Constitution provides that the Cabinet shall now consist of Cabinet Secretaries Not Ministers. The Section should therefore be amended to reflect this.</p> <p>County hospitals and pharmacies have been transferred to the county governments. It is therefore the duty of the county governments to monitor the issuing, use, and storage of poisons in county hospitals and ensure that poisons are being handled in a manner that is consistent with the law. However, because of the technical nature of this function, the counties shall need to appoint a qualified person to ensure that the Pharmacy and Poisons Act and its regulations are being followed.</p>	<p>Amend to remove the word “minister” and replace it with “<i>Cabinet Secretary</i>”.</p> <p>Amend to remove the word “minister” and replace it with “<i>Cabinet Secretary</i>”.</p> <p>Amend to provide that the person in hospitals tasked with carrying out the inspection of the storage of poisons and the records regarding the issue, use and dispensing of poisons shall submit their reports to the person in charge of the hospital and the county government. Also, amend to provide that the Counties, in consultation with the Board, should appoint county representatives to aid in the monitoring of the issuing, use and storage of poisons and drugs on hospitals and pharmacies.</p>
<p>Pharmacy and Poisons (Conduct of Inquiries) Rules (Legal Notice No 52 of 1985)</p>	<p>The <i>Rules</i> currently provides that the Board, shall hear complaints against registered pharmacists and make determinations based on the evidence presented. The Board is comprised only of professionals in the pharmaceutical industry-</p>	<p>To ensure that disciplinary hearings are conducted in a manner that adheres to the Bill of Rights as provided in Chapter 4 of the Constitution and other principles of justice, a lawyer/advocate may be useful during disciplinary hearings to guide the Board.</p>	<p>Consider amending to include that the Board one lawyer.</p> <p>Also, procedures should be put in place for the appointment and removal of such an advocate.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
Pharmacy and Poisons (Registration of Drugs) Rules (Legal Notice No. 147 of 1981 as amended by L.N. 142/1991 and L.N. 192/2010)	it is not a requirement that a Board member have legal experience. No amendment required.	These rules provide the procedure and standards for the registration of drugs. This function is still a national government function thus no amendment is required.	
Pharmacy and Poisons (Control of Drugs) Rules (Legal Notice No 180 of 1969 as amended by L.N. 247/1969, L.N. 228/1974)	No amendment required.	The Rules stipulate that no person shall import possess, distribute, sell or purchase Part I drugs without authorisation and, where a person is authorised to import possess, distribute, sell or purchase Part I drugs, they shall do so in accordance with the Act. These rules provide guidance on the handling of Part 1 drugs thus do not require to be amended.	
Public Health Act	<p>Section 2 defines a magistrate as a magistrate empowered to hold a subordinate court of the first, second or third class.</p> <p>Section 2 defines the Minister as the minister for the time being responsible for health.</p>	<p>The division of magistrate's courts into classes was done away with by Section 5 of the Magistrates' Courts Act, 2015. The Act should therefore be amended to reflect the new divisions of subordinate courts.</p> <p>Article 152 of the Constitution provides that the Cabinet shall now consist of Cabinet Secretaries. The Section should therefore be amended to reflect this.</p>	<p>Delete and restructure to align to the laws on the structures of the judiciary.</p> <p>Delete Other references in the Act to subordinate courts of a certain class. These include Section 124 (5), Section 126C (3) and Section 126D (5) and (6).</p> <p>Amend to remove the words "<i>the Minister</i>" in all the instances they appear and replace them with "<i>the Cabinet Secretary</i>".</p> <p>This amendment should be made throughout the Act.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 2 defines the drainage authority as the <i>Ministry of Works</i> or any other authority the Minister may appoint.</p>	<p>The term drainage authority is not used in the Act.</p>	<p>Delete section.</p>
	<p>Section 2 currently provides that health authorities, in municipalities are the municipal councils.</p> <p>The section also provides that the health authority, in areas that are not municipal areas is the Minister.</p>	<p>The function of health has been devolved to the counties.</p>	<p>Delete since the Health Act addresses health as a devolved function.</p>
	<p>Section 2 defines a medical officer of health as the <i>Director of Medical Services</i>, the duly appointed medical officer of a municipality and, with regards to any other area, a medical officer of health appointed for the area by the minister.</p>	<p>The Health Act (Act No 21 of 2017), in section 16 - 17, establishes the office of the <i>Director General of Medical Services</i>. Also, Section 19 of the created the Health Act (Act No 21 of 2017) establishes the office of <i>County Director of Health</i> which is charged with, among others, being the technical advisor to the county government on health matters.</p>	<p>Delete as this is it is addressed differently in the Health Act.</p>
	<p>Section 3 provides that there shall be a <i>Central Board of Health</i> which shall consist of Director of Medical Services, a sanitary engineer, a secretary, and six other persons, three of whom shall be medical practitioners.</p>	<p>Section 16 and 17 of the Health Act (Act No. 21 of 2017) replaced the office of the <i>Director of Medical Services</i> with that of the <i>Director General of Medical Services</i>.</p> <p>Furthermore, the Health Act (Act No. 21 of 2017) sets out the structure of the <i>National Health System</i> and <i>County Health System</i>.</p>	<p>Delete section.</p>
	<p>Section 7B (1) establishes <i>District Health Management Boards</i> which are mandated with overseeing the running of government health</p>	<p>The function of overseeing county health facilities has been transferred to the counties and the sub-county entities are likely to be established by way of regulations under the</p>	<p>Delete Section</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	institutions in the districts.	health Act or by County legislation.	
	Section 9 (1) provides for the appointment of the <i>director of medical services</i> , the <i>deputy director of Medical Services</i> , <i>assistant directors of medical services</i> , <i>medical officers of health</i> , <i>assistant medical officers of health</i> , <i>medical officers</i> , <i>pathologists</i> , <i>health inspectors</i> , <i>port health officers</i> and such other officers.	Human resources for the national and county government is now done by the governments at either level and cannot be prescribed in detail by this Act. It is an issue that is addressed in the Health Act .	Delete this section
	Section 9 (2) empowers municipal councils to appoint medical officers for the municipality with the approval or the <i>Minister of health</i> and the <i>Minister for local government</i> .	The section refers to the defunct municipal councils.	Delete this section.
	Section 10 establishes the medical department whose functions include to preventing and guarding against the introduction of infectious disease into Kenya from outside; promoting the public health and preventing, limiting or suppressing of infectious, communicable or preventable disease within Kenya; and advising and directing local authorities in regard to matters affecting the public.	Section is premised on the old structures of the centralised government. The functional assignment between the two levels of government under devolution is addressed in Sections 15 and 20 of the Health Act (Act No.21 of 2017) .	Delete.
	Section 11 empowers the Minister to cause inquiries to be made into any matter concerning	Public health has been devolved to the counties which includes looking into public health concerns	Amend to specify the public health issues which fall under the mandate of the county

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	public health in any place.	which arise at the county level.	governments and those which fall under the mandate of the national government.
	Section 14 provides for the procedure to be adopted when a complaint is made to the Central Board about the public health being endangered as a result of the municipal council's failure to perform its duty.	This procedure and the structure no longer exists under devolved governance.	Delete this section
	This section empowers the Minister in charge of local government to approve by-laws made by municipal councils, which affect public health. The Minister in charge of local government shall obtain the agreement of the Minister responsible for health before approving the by-laws.	The Procedure is no longer relevant under devolved governance.	Delete
	Section 16 provides that where there is a conflict between the Act and any other Act, the provisions of the Public Health Act will prevail.	The Health Act (Act No.21 of 2017) is the main act relating to health and the provisions of the Public Health Act are not aligned to the constitution, this provision does not make sense.	Delete this section.
	Section 32 provides that municipal councils shall build or contract for the use of hospitals or other places of reception. This shall be done with the permission of the Central Board of Health.	Section refers to non-existent structures.	Delete this section.
	Section 33 provides that the cost of maintenance of a patient who is not a pauper shall be considered a debt owed	This section is unclear given that Health is now a human right. It might need to be reviewed in view of the recognition of health as a right.	Amend to clarify this section in light of Article 43 of the Constitution . The amendment should address the issue of retention by hospitals

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	by the patient to the municipal council.		of patients who have outstanding bills. This clause is best situated in the Health Act.
	Section 34 empowers municipal councils to contract third parties for the temporary supply of medicine and medical assistance.	This section is obsolete and not aligned to devolved governance	Delete this section.
	Section 36 empowers the Minister to make rules for the handling of threats of epidemic, endemic or infectious diseases.	Section is situated in a centralised governance system.	Amend to provide that the counties shall make laws and rules for the handling of outbreak of infectious diseases and the national government shall formulate policies to guide the counties. This section is best situated in the Health Act .
	Section 51 empowers the Minister to order the examination of a person if, as a result of report from a medical officer, he believes the person is suffering from a venereal disease	This section may be in breach of health and human rights standards of patient care and may not be necessary in the modern day.	Delete this section.
	Section 67 provides that where a person from a sea vessel is suffering from an infectious disease and, on the orders of the port health official is removed to a hospital or place of isolation, the national government may recover the expenses incurred in the treatment said person from the masters of vessels from which person came.	The section may amount to a violation of rights. Communicable diseases are not managed in such a punitive manner.	Delete and redraft to provide ways of managing communicable diseases in line with the policies formulated under Section 69 (1)(i) of the Health Act

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 77 empowers the Minister to set up asylums for the detention of persons with <i>Leprosy</i> .	<i>Leprosy</i> is now eliminated in Kenya.	Delete this section.
	Section 78 provides that it is an offence for one person to fail to report to the nearest magistrate another person who they suspect has <i>Leprosy</i> .	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 79 empowers magistrates to order police officers to detain persons suspected of having leprosy until such persons are examined in accordance with the Act.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 80 provides for the procedure to be followed to ensure the examination of a person suspected of having <i>Leprosy</i> .	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 81 provides that where a person suspected to have leprosy is examined and found to not have it, they shall be discharged from their detention.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 82 provides for the procedure to be followed where, after an examination, there is doubt as to whether a person suspected to have leprosy actually has the disease.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 83 requires that the interim reception order and the reports of the medical practitioners which led to the issuance of the order should be	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	submitted to the Minister.		
	Section 84 provides for the procedure to be followed when a person wants to voluntarily submit themselves for examination for leprosy.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 85 empowers the Minister to issue detention orders where he is satisfied that the person detained under an interim reception order is affected with leprosy	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 86 requires that where the minister is not satisfied that an inmate has leprosy, they shall forward the order and medical reports to the <i>Director of Medical Services</i> . Where the director is satisfied, they shall direct the Minister to issue a detention order. Where the director is not satisfied, they shall order the superintendent to release the person.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 87 empowers the Minister to make orders for the release of persons detained in asylums where there is sufficient reason.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 88 (1) provides that the minister shall appoint superintendents of asylums. The superintendents shall be under the supervision and direction of the director of medical services.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 88 (2) provides that medical officers, attendants, guards and other officers in asylums shall be appointed by the Director of Medical Services.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 89 provides for the duties of superintendents of leprosy asylums.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 90 prohibits people with leprosy who are in asylums from interacting with the outside world.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 91 prohibits persons in asylums from leaving unless they are discharged in accordance with the provisions of the Act. It also allows for the arrest without a warrant of persons who leave asylums without being discharged.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 92 provides for the visitation of persons in leprosy asylums by friends, relatives and legal advisors.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 93 provides that the cost of erecting and establishing asylums shall be provided by parliament.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 94 provides that superintendents of asylums can, with the permission of the Minister, recover the expenses of maintaining an inmate from that inmate. It also empowers a superintendent of an asylum to enter into	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>agreements with inmates or their representatives for the erection of buildings for the inmate. The superintendents would enter these agreements on behalf of the government.</p>		
	<p>Section 95 allows the high court to appoint a manager for the property of a person who is detained in asylum. Applications for such orders shall be made by the <i>Director of Public Prosecutions</i>.</p>	<p><i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.</p>	<p>Delete this section.</p>
	<p>Section 96 requires the medical officer of health who examines a person suspected of having leprosy to ensure that the house of the person is cleansed and disinfected if it is found that the person does have leprosy and needs to be isolated.</p>	<p><i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.</p>	<p>Delete this section.</p>
	<p>Section 97 requires all persons who are detained in asylums to submit themselves for photographs whenever required to do so by the superintendent of the asylum. The section also makes it an offence to supply or exhibit photographs of people detained in an asylum without express authorisation.</p>	<p><i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.</p> <p>Also, this section goes against a person's right to privacy as provided for in Article 31 of the Constitution as well as the right to dignity as provided in Article 29 of the Constitution.</p>	<p>Delete this section.</p>
	<p>Section 98 provides that any person who commits an offence under this part of the Act shall be liable to a fine of Kes 15,000 or an</p>	<p><i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.</p>	<p>Delete this section.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	imprisonment term not exceeding 1 year or both the fine and imprisonment.		
	Section 99 empowers the Minister to make rules to with regards to the handling of persons with leprosy, including providing for the detention of persons in asylums and the staffing of asylums.	Leprosy is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 100 provides that where it shall cause undue delay or inconvenience to have a person suspected of having leprosy examined by two medical practitioners, the person may be examined by one medical practitioner whose report should be confirmed by a second examiner as soon as is convenient.	Leprosy is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 101 empowers police officers to execute orders made under the <i>leprosy</i> part of the act and makes it an offence for any person to resist or obstruct the execution of any duty provided for under the Act.	Leprosy is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 102 empowers the minister to grant exemptions to persons which allow said persons to operate private leprosy asylums.	Leprosy is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 103 provides for the definition of terms to be used in the part of the Act which provides for smallpox. It defines a public vaccinator as a	Human resources for the national and county government is now done by the governments at either level and cannot be prescribed in detail by this	Rework this section to provide for public vaccination officers within the structure of the national health system and county

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	public vaccinator appointed by the <i>Director of Medical Services</i> and any person appointed to assist a public vaccinator.	Act. It is an issue that is addressed in the health Act.	health system as they are provided for by the Health Act.
	The Section 106 provides for emergency vaccination procedures in areas that are threatened by <i>Smallpox</i> outbreaks.	Section situated in the former centralised system and the local governments.	Delete this section and address the issue in the Health Act (Act No 21 of 2017) .
	Section 111 empowers persons who are in charge of leper asylum or mental hospital or chronic sick hospital, jail, prison, reformatory, penitentiary or other similar institution to cause to be vaccinated, all persons admitted therein if they have not been successfully vaccinated in the preceding 5 years.	<i>Leprosy</i> is now eliminated in Kenya.	Amend to delete the words " <i>leper asylum</i> ".
	Section 112 (2) empowers the <i>Director of Medical Services</i> to instruct public vaccinators to visit schools and inspect the children attending them to establish that the children have been vaccinated against <i>Smallpox</i> .	This section is situated in the former centralised system and the local governments.	Rework this section to recognise the national and <i>County Health Systems</i> that have been set up by the Constitution and the Health Act. (Act No. 21 of 2017) .
	Section 114 (b) empowers the Minister to make rules conferring powers and imposing duties on magistrates, police and other officers to enforce the vaccination provisions of the Act.	This section is situated in the former centralised system and the local governments.	Delete this section and address the issue in the Health Act. (Act No.21 of 2017) .

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 114 (c) empowers the Minister to make rules prescribing the conditions under which the <i>Smallpox</i> vaccine shall be given to medical practitioners, municipal councils and others.</p>	<p>This section is situated in the former centralised system and the local governments.</p>	<p>Delete this section and address the issue in the Health Act. (Act No.21 of 2017).</p>
	<p>Section 116 provides that it is the duty of every local authority to take all practical measures to maintain cleanliness and sanitary conditions in the district.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act. This should also be done in Sections 126C, 26D, 129 and 144.</p>
	<p>Section 119 empowers the medical officer of health to serve a notice on any person causing a nuisance (as defined by section 118) requiring the person to remove the nuisance within a specified time.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address the issue in light of the county health systems provided for in the Health Act. (Act No. 21 of 2017).</p>
	<p>Section 120 provides for the procedure to be followed where an author of a nuisance fails to comply with a notice. The medical officer who issued the notice should lodge a complaint with a magistrate who shall then make appropriate orders.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address the issue in light of the county health systems provided for in the Health Act. (Act No. 21 of 2017).</p>
	<p>Section 121 provides for the penalty of failing to comply with the order of a medical officer with regards to a nuisance.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address the issue in light of the county health systems provided for in the Health Act. (Act No. 21 of 2017).</p>
	<p>Section 122 empowers the court to order a health authority to remove a nuisance if the owner or occupier of the</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address the issue in light of the county health systems provided for in the</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>premises where the nuisance is located is unknown or cannot be found.</p>		<p>Health Act. (Act No. 21 of 2017).</p>
	<p>Section 123 empowers medical officers, health authorities or any of their officers and police officer on the order of a magistrate to enter any building or premises to inspect the same for the existence of any nuisance. This inspection may include opening up the floor of the premises or building to inspect drains.</p> <p>Where it is found that there is no nuisance, the health authority is required to restore the premises at its own cost.</p>	<p>Section situated in the former centralised system and the local governments. Also, the section does not require these officers to have probable cause to inspect a premise. Thus, this section is prone to abuse and may result in the violation of people's rights to property as guaranteed by Article 40 of the Constitution.</p>	<p>Delete and address the issue in light of the county health systems provided for in the Health Act (Act No. 21 of 2017). Also, conditions for the exercise of this power should be put in place to safeguard citizens' right to property.</p>
	<p>Section 124 empowers the magistrate's court of the first class to make orders for the demolition of buildings where it is satisfied that the building is defectively constructed or dilapidated.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Amend to recognise the current system of magistrates court as provided by the Magistrate's Court Act (Act No. 26 of 2015)</p>
	<p>Section 125 empowers the medical department to collect data on overcrowding and insufficient housing and inquire into the methods of dealing with such issues. The department is also empowered to publish their recommendations.</p>	<p>This section addresses the inter- relation between poor housing condition and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other departments at national levels.</p>	<p>Delete and address the issue within the Health Act.</p>
	<p>Section 126 provides that the Minister shall make rules and may confer powers on local authorities on various</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>matters including inspection of land, dwellings, buildings, factories and trade premises and the keeping of animals or birds.</p> <p>Section 126A empowers the municipal councils, when required to do so by the Minister for Local government with the agreement of the <i>Minister for health</i>, to make by laws on buildings and sanitation.</p> <p>Section 126B provides that, where by-laws made by municipal councils under Section 126A are unreasonable, the local authority may, with the consent of the Minister, relax them.</p> <p>Section 126C empowers local authorities to reject plans of work that are not in accordance with building by-laws made by municipal councils. Where there is a dispute over rejected plans, either the local authority or the person who lodged the plans may apply to a magistrate's court of the first class.</p> <p>Section 126D provides the procedure to be followed when construction works are in contravention of building by-laws.</p>	<p>Section situated in the former centralised system and the local governments.</p> <p>Section situated in the former centralised system and the local governments.</p> <p>This section addresses the inter- relation between poor construction practices and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other departments at national levels.</p> <p>This section addresses the inter- relation between poor construction practices and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other</p>	<p>Delete and address issue in the Health Act.</p> <p>Delete and address issue in the Health Act.</p> <p>Delete and address the issue within the Health Act.</p> <p>Delete and address the issue within the Health Act.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		departments at national levels.	
	Section 127 empowers medical officers to determine the materials which shall be used to construct buildings used to store food stuffs. Where such a building is not constructed in accordance with the medical officer's direction, the medical officer may enter the premises and cause the necessary works to be done at the cost of the building owner.	This section addresses the inter- relation between poor food storage practices and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other departments at national levels.	Delete and address the issue within the Health Act .
	Section 130 provides that the Minister, on the advice of the Central Health Board shall make rules for the protection of water supplies.	Section situated in the former centralised system and the local governments.	Delete and address issue in the Health Act .
	Section 131 empowers medical officers of health, veterinary officers, sanitary inspectors, meat inspectors to seize tainted or unwholesome food which is to be sold and, upon application to a magistrate, destroy the same.	Section situated in the former centralised system and the local governments.	Delete and address issue in the Health Act .
	Section 132 empowers medical officers of health and persons so authorised by a health authority to enter any premises used for the sale, preparation or storage of food and seize any unwholesome foods found therein and, upon application to a magistrate, destroy the same.	Section situated in the former centralised system and the local governments.	Delete and address issue in the Health Act .



Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 134 provides that the Minister shall make rules for the protection of food.</p>	<p>Section makes sense on food safety but should provide this in national legislation and regulations while the county governments can also make implementation laws and regulations.</p>	<p>Amend to provide that the Cabinet Secretary shall formulate policies for the protection of food including the inspection of cattle, stock and dairy produce and fixing standards for dairy products and the storage of food. The county governments shall then enact county laws to implement these policies.</p>
	<p>Section 135 empowers the Minister, with the advice of the Board to make rules for the protection of food. These include prohibiting registration of dairy farmers and ordering the inspection of premises where dairy and meat products are produced and kept.</p>	<p>It is the duty of the counties to ensure the safety and hygiene of food and places where it is produced, obtained or sold. The making of orders to protect food is thus a county government function.</p>	<p>Delete and re-draft to provide for county implementation of the national standards on food safety</p>
	<p>Section 135A (1) and (2) provide that the municipal councils, with the approval of the Minister may make bye-laws to regulate the production, preparation, storage and sale of milk and milk products. These by-laws shall be passed in accordance with the Local Government Act.</p>	<p>The function of regulating the production and preparation of food which includes dairy and dairy production should be performed by the county government as it is part of the food safety and control function.</p>	<p>Delete and re-draft to provide that the county government shall laws to regulate the production, preparation, storage, certification and sale of milk and milk products.</p>
	<p>Section 140 requires owners of cesspits to ensure that they are protected or screened so as to prevent the entry and breeding of mosquitoes therein. This screening must be done to the satisfaction of a medical officer.</p>	<p>While this is an important provision in so far as the prevention of malaria is concerned, its implementation is situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 141 empowers medical officers of health to direct owners of gutters, pipes, grooves or waterways to drill holes into said gutters, pipes, grooves and waterways at least every 2 feet so as to prevent the accumulation of water.</p>	<p>While this is an important provision in so far as the prevention of malaria is concerned, its implementation is situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act</p>
	<p>Section 142 empowers the <i>Director of Medical Services</i>, persons authorised by him or medical officers of health to destroy immature stages of mosquitoes when the same are found on in any collection of water.</p>	<p>While this is an important provision in so far as the prevention of malaria is concerned, its implementation is situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act</p>
	<p>Section 144 (1) provides that the Minister has the duty of selecting sites to be used as cemeteries and that burials shall be conducted in accordance with rules made by the local authority.</p>	<p>The section is good but situated in the former system of government. The function of establishing and managing cemeteries was devolved to the county governments. Thus, the county government should select sites for cemeteries and make laws to provide for burials.</p>	<p>Delete and re-draft to provide that the county government shall select sites to be used as cemeteries and that burials shall be conducted in accordance with county laws.</p>
	<p>Section 145 defined authorised cemeteries as cemeteries authorised by the Minister.</p>	<p>Cemeteries are now under the control of the county governments.</p>	<p>Amend to provide that authorised cemeteries are cemeteries authorised by the relevant county government.</p>
	<p>Section 146 (3) provides that permits to exhume bodies or the remains of bodies shall be granted by the Minister.</p>	<p>Permits for exhumation should be granted by the county government because cemeteries are under the control and management of the county governments.</p>	<p>Amend to provide that a permit to exhume a body or the remains of any body from a cemetery shall be granted by the county government.</p>

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Recommendations

Section 147 (1) only allows the Minister to make an order for exhumation of a body to enable the execution of public works.

The county government is tasked with county transport and county public works while the national government is tasked with the construction and operation of national roads. Both levels of government therefore need the power to order exhumations for the execution of public works.

Amend to clarify the instances in which applications for exhumation orders should be made to the Cabinet Secretary and the instances in which they should be made to the county government.

Section 149 provides that the Minister can close cemeteries.

The establishment and management of cemeteries is a county function thus, orders to close a cemetery should come from the county government not the Cabinet Secretary.

Amend to provide that the county government shall have the power to close any cemetery.

Section 150 empowers the board to recover expenses incurred in the execution of an order that was requested by a person from the person in question.

The section is good but situated in the former system of government.

Delete and re-draft to align to devolved government.

Section 152 requires all persons who wish to open lodging houses to obtain a licence for the same from a local authority.

The section is good but situated in the former system of government.

Delete and re-draft to align to devolved government.

Section 153 (2) empowers the *Director of Medical Services* to authorise a medical practitioner to visit and inspect nursing homes, convalescent homes, private hospitals, private mental hospitals, maternity homes, infirmaries or any institutions where invalids, convalescents or children are treated. While **Section 153 (3)**

The section is good but situated in the former system of government.

Delete and re-draft to align to devolved government.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>makes it an offence to obstruct such an inspection.</p> <p>Section 153 (3) provides for instances where the Central Board may refuse to grant a licence to operate a nursing homes, convalescent home, private hospital, private mental hospital, maternity home, infirmary or any other institution where invalids, convalescents or children are treated</p>	<p>The function of granting licences is a county government function.</p>	<p>Amend to provide that licences shall be granted by county governments in accordance with the rules set for the same by the national government.</p>
	<p>Section 155 provides that where, in the opinion of a local authority, a public latrine is required, the authority shall apply to the Minister for permission to erect it.</p>	<p>The section is good but situated in the former system of government.</p>	<p>Delete and re-draft to align to devolved government.</p>
	<p>Section 156 empowers local authorities to prohibit the washing of clothes in places not appointed for such purposes.</p>	<p>The section is situated in the former system of government.</p>	<p>Delete and re-draft to align to devolved government.</p>
	<p>Section 157 provides that the Minister, where advised as such by the Central Board, may prohibit the use of irrigation to grow of crops within a township or within three miles of the boundaries of a township.</p>	<p>The section is good but situated in the former system of government.</p>	<p>Amend to provide that the county government can, where necessary, prohibit the use of irrigation to grow crops within the boundaries of a city, town or municipality or within 3 miles of the boundaries of a city, town or municipality.</p>
	<p>Section 157 (2) provides that the Minister shall make rules on the collection of standing water, to provide for the draining of standing water and to the inspection repair and</p>	<p>The section is good but situated in the former system of government. Prevention of waterborne diseases is a part of primary healthcare thus a function for the county government. Although, when passing</p>	<p>Amend to provide that the county government may pass laws regarding these issues. These laws should be made in accordance with national public health policies and the</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	cleaning of channels, canals and drains.	laws on public health, the counties should be guided by national policy.	relevant national legislation.
	Section 159 empowers the <i>District Commissioner</i> , the <i>Central Board of Health</i> , a <i>Local Authority Officer</i> , a <i>Medical Officer of Health</i> or a <i>Sanitary Inspector</i> to authenticate orders or notices made under the Act.	The <i>Office of the District Commissioner</i> does not exist in the current government.	Delete and re-draft to align to devolved government.
	Section 161 empowers <i>Director of Medical Services</i> to authorise the <i>Deputy Director of Medical Services</i> , any assistant director of medical services, medical officer of health, port health officer or medical officer of the department to perform his functions set out under the Act. It also empowers the <i>Director of Medical Services</i> and the <i>Deputy Director of Medical Services</i> to perform the functions of the <i>Director of Medical Services</i> , the <i>Deputy Director of Medical Services</i> or any assistant director of medical services or medical officer provided under the Act.	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 163 (1) empowers any medical officer of health or health inspector, district surgeon or port health officer, or any police officer of or above the	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
<p>Public Health Act interphase with the Health Act</p>	<p>rank of Inspector, or any other person generally or specially authorized in writing by the <i>Director of Medical Services</i> to enter onto a premise and inspect in the performance of any of the duties given to them under the Act.</p>		
	<p>Section 167 empowers health authorities or any persons authorised by them to prosecute any cases which may arise from contravention of the Act.</p>	<p>The section is practical given the technical nature of offences under the Act but situated in the former system of government.</p>	<p>Delete and re-draft to align to devolved government.</p>
	<p>Section 168A (1) empowers municipal councils to, with the approval of the minister, make by-laws for the prevention of breeding of mosquitoes and flies.</p>	<p>The section is good but situated in the former system of government Prevention of malaria and other such diseases is a county function thus the passing of the relevant laws should be done by the county government. Urban area and city boards should help in the implementation of these laws.</p>	<p>Amend to provide that the county government may make laws for preventing the breeding of mosquitoes and flies. These laws should then be enforced by urban areas and city boards.</p>
<p>Section 169 empowers the Minister to make rules to aid in the implementation of the Act.</p>	<p>The section is situated in the former system of government.</p>	<p>Amend to provide that the Cabinet Secretary has the power to make policy for the carrying out of the purposes of the Act and the county governments may pass county legislation and regulations to effect the implementation of the national policies and laws.</p>	
		<p>Harmonise the Public health and the health Act by lifting the remnant of the clauses of the public Health Act into the Health Act.</p>	