

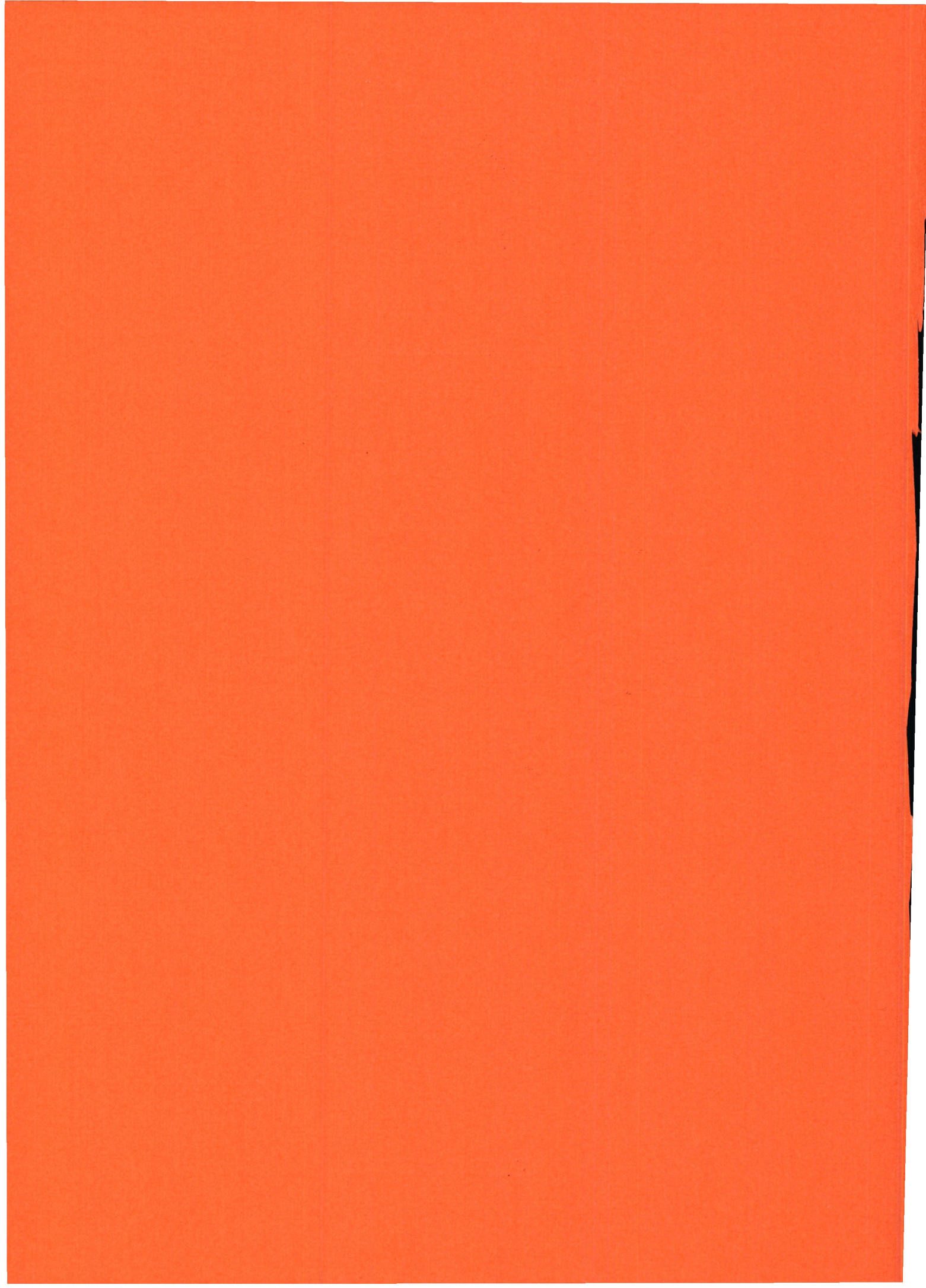
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REPUBLIC OF KENYA

**The Report of the
Risk Advisory Group
Limited on
Kenya's Anti-Corruption
Initiatives**

FEBRUARY, 2002



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**The Report of the
Risk Advisory Group Limited on
Kenya's Anti-Corruption
Initiatives**

To: The Government of The Republic of Kenya

From: The Risk Advisory Group Limited

Date: 22nd February 2002

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1. INTRODUCTION

On 4th January 2002 The Risk Advisory Group (hereinafter referred to as "TRAG") were instructed by The Government of the Republic of Kenya (hereinafter referred to as "the Government"), through the Attorney General's office:

- a) To confer with the Government, Political Parties, Domestic Interest Groups, Local and International Business and Financial Institutions on **their views** regarding existing Kenyan measures and mechanisms for combating corruption and what may be required to improve them with a view to having an effective machinery and strategic plan to combat corruption which is credible, nationally and internationally;
- b) To assess the appropriateness of existing and planned approaches, programmes and activities for enforcement, public awareness/sensitisation and corruption prevention, designed to promote good governance;
- c) To study, comment and make recommendations on:
 - i) The Draft Anti Corruption and Economic Crimes Bill
 - ii) The Public Service (Code of Ethics and Conduct) Bill
 - iii) The Public Sector Integrity Programme
 - iv) The Draft National Anti Corruption Plan
 - v) The Draft Strategic Plan of the Anti Corruption Police Unit.

The full particulars of TRAG's terms of reference are set out at *Annex 1*.

The project duration was six weeks and TRAG were instructed to report by 22nd February 2002.

In order to discharge our terms of reference we carried out the following steps:

- a) Between 14th January 2002 and 4th February 2002, consultants from TRAG attended in Kenya and conducted wide-ranging interviews, the full particulars of which are set out at *Annex 2*. In some instances, interviews that we would have wished to have held were not possible for administrative reasons and, in three instances, individuals refused to meet with us.
- b) In addition, we collected for review, and reviewed, a substantial amount of documentation, the full particulars of which are set out at *Annex 3*.
- c) Finally, because of its importance to the current strategy, we conducted a preliminary review of the work being undertaken by the Anti Corruption Police Unit (hereinafter referred to as the "ACPU").

This review took the form of analysing approximately 250 complaints made to the Organisation, or its predecessor, the Kenyan Anti Corruption Authority (hereinafter referred to as the "KACA"), but which had been processed by the ACPU, and reviewing the progress made in respect of cases accepted for investigation.

In addition, we sought to review all cases where prosecutions had been brought. With the support of the Attorney General we requested, and were supplied with, investigation and prosecution files. However, in spite of the Attorney General's support and intervention, by the time we left, nineteen prosecution files had not been provided to us. We did, however, take the opportunity of discussing the work and work practices of the ACPU with a large number of officers within the Unit.

Finally, we reviewed some of the work of both the Prevention and Education Units.

Given the time restraints on this project, we have concentrated on detailing the issues that we believe are critical to improving the current anti-corruption strategy. This is not to minimise issues not reported; rather our conclusion is that the level of corruption within Kenya is becoming so endemic that it is beginning to threaten the basic structures of the State. There are many issues that need to be addressed, however there are limited resources. It is therefore essential to concentrate on a number of core fundamentals. These include:

- a) Drafting and passing legislation that both creates an independent commission against corruption and provides it with appropriate investigative powers;
- b) Creating a new prosecution unit within the Attorney General's Office with an experienced economic crime and corruption prosecution counsel;
- c) Increasing the number of specialist economic crime and corruption courts and resourcing them with appropriate qualified judges;
- d) Resolving the difficulties around the production of defendants and ensuring that the penal system delivers the sentences imposed by the courts.

In short, Kenya's most pressing need is to have an effective deterrent against economic crime and corruption in place. It also needs effective prevention and education strategies. The ACPU and the current criminal court process require material reform to achieve this objective.

Once the fundamentals are in place the process can evolve and encompass other significant issues.

In view of the adverse comments that were made about our instruction we would like to state that at no stage was any obstruction placed in our way by the Government during the course of our research, other than the apparent failure of the ACPU to produce files identified above. Specifically, at no stage was any attempt made to control or otherwise influence our activities.

We would like to thank all of those who contributed to our study.

2. EXECUTIVE SUMMARY

There were a number of core themes which repeated themselves with all interviewees and which echoed research available to us.

i) **In relation to corruption:**

That corruption was adversely affecting Kenya domestically and internationally;

That corruption was becoming much worse, in that it affected almost every aspect of daily life for ordinary Kenyans, and was an increasingly common factor in their lives;

That no section of the community was immune from it;

That people from all levels of society were involved in corruption and that it was not restricted to one particular group;

That there were great concerns about the independence of the judiciary and the application of the rule of law;

That professionals were widely involved in corruption and had failed to regulate themselves through their professional bodies;

That the Government was not doing enough to address the problem;

That it would be acceptable for external expertise to become involved in helping to address the problem, providing the parameters of the nature of the help and the duration were clearly defined.

ii) **In relation to the existing measures and mechanisms for combating corruption:**

The constitutional challenge to, and demise of, the KACA was seen by almost everyone interviewed as a very significant set-back in the fight against corruption;

There was very significant doubt expressed as to the rationale for the Court's decision and many openly expressed the view that it was not based on sound legal reasoning,

There was little understanding of why the Attorney General had decided not to appeal the decision and criticism of him for taking this position. This was the case even though a press statement had been made which sought to explain the legal basis for this decision, specifically that a right of appeal does not lie from a ruling of the Constitutional Court (see press statement at *Annex 4*);

Significant scepticism was expressed by all non-governmental interviewees as to the role and effectiveness of the ACPU. Particular concern was expressed at the fact that the ACPU was fundamentally a "police unit" in an environment where police were seen as fundamentally corrupt;

Concern was expressed as to whether the ACPU would be effectively supported by the Attorney General's Office in prosecuting those alleged to be corrupt, but no specific cases were identified in this regard;

Fundamental concerns were expressed as to the independence of the judiciary and, in particular, whether the rule of law would be applied in all cases brought before the courts;

Without exception, the issue of "amnesty" was raised as a critical issue to be resolved before matters could proceed;

Concern was expressed as to the form of the Anti Corruption and Economic Crimes Bill, in particular whether it would be an effective tool or simply a weak piece of legislation.

iii) In relation to what may be required to improve the measures and mechanisms for combating corruption:

Every non-governmental interviewee, including the multilaterals and donor states, stated that the critical issue in fighting corruption within Kenya was the "political will" to fight;

Assuming the necessary political will, the primary measures identified for combating corruption were:-

- Corruption Drivers

Reform of the Ndegwa Commission Report 1972 which sanctioned civil servants engaging in private business whilst holding office;

Abolition of the Harambee for public servants and politicians;

Increasing public sector salaries, specifically in areas connected to the criminal justice system.

- Corruption Control

Improvements in effective systems and controls on governmental expenditure;

The creation of an effective deterrent to control abuse of "discretion". In particular:

- a) The creation of an independent anti corruption body with appropriate investigative powers
- b) The capability to have an effective prosecution
- c) The creation of economic crime courts
- d) An effective anti corruption education programme
- e) An appropriate prevention strategy

2.1 THE APPROPRIATENESS OF EXISTING AND PLANNED APPROACHES

It is our respectful view that the current Kenyan Government approach to combating corruption will be enhanced by addressing the following issues:

- a) It must adequately address the primary drivers identified above;
- b) There must be a realistic appreciation of how much effort and financial resource and time will be required to change what has become a major endemic issue;
- c) The problem is of a magnitude that significant policy decisions need to be made which will facilitate change.

In particular we believe:

- a) That the corruption drivers need to be addressed;
- b) There is a requirement for a fully independent commission against corruption which is adequately resourced with appropriate technical skills and financial support;
- c) There is a need for a specialist prosecution unit within the Attorney General's Office;
- d) There is a need for special courts resourced with judges with the appropriate background and experience. There may also be the need for a special appellate court structure;
- e) There is a need to reform the custody arrangements of those charged with economic crime and corruption offences.

We doubt whether the Kenyan Government has sufficient resources to create and execute an effective strategy against corruption. Material long-term financial support is therefore necessary from the multilaterals and donor states.

In relation to the ACPU we have the following observations:

- a) Its leadership must understand its mandate and be fully capable of giving effect to it;
- b) The leadership must be well versed in the three pronged approach to mitigating corruption and the relationships between each element of the approach;
- c) The ACPU must gain public acceptance that it is an appropriate tool to give effect to its policy in the light of the fact that it is a "police unit".

For the reasons identified above it is imperative that future legislation and strategies must take into account the foregoing. We do, however, believe that there is a real opportunity to achieve cross-party consensus in relation to the recommendations set out below.

2.2 RECOMMENDATIONS

To the extent that our findings are accepted by the Kenyan Government we recommend the following action be taken:

- a) That the “drivers to corruption” be addressed;
- b) That Kenya must create an effective deterrent to deter those who might otherwise act corruptly;
- c) That Kenya must create effective preventative and education programmes in support of the deterrent;
- d) That the amnesty issue be depoliticised in order to be resolved by Parliament;
- e) That an appreciation of the extent of the task ahead be developed and communicated to the public, including the multilaterals and donor nations;
- f) The Government must urgently undertake the following steps:
 - Develop and present draft legislation for the creation of an independent commission against corruption with all necessary investigative powers;
 - Create a strategic plan for the independent commission against corruption to include the resources required to give effect to the plan;
 - Review with the Attorney General the enhancement of the resources available in his Office in order to create an effective prosecution unit and generate a strategic plan;
 - Review with the Chief Justice the creation of further special corruption and economic crime courts and create a strategic plan to ensure the courts are available and adequately resourced, both in relation to process and adequate judicial expertise, both at First Instance and Appellate level;
 - Review with the Commissioner of Prisons the custody arrangements for, and delivery of, prisoners to economic crimes and corruption courts and make recommendations;
- g) That, in the interim, it is important that the current structure be permitted to continue;
- h) That aid be sought from the multilaterals and the donor nations to give effect to the new strategic plans.

2.3 OTHER OBSERVATIONS

2.3.1 *Depoliticisation*

The course of our interviews, our review of documents, and the reaction to our presence demonstrated just how politicised the corruption issue has become within Kenya. This is understandable but destructive.

If significant progress is to be made, a genuine attempt to depoliticise it should be made.

2.3.2 *Tax*

Whilst it is outside our remit, we suggest that consideration be given to giving the new courts jurisdiction over revenue cases. We believe that this will increase revenue collection because of the existence of a more effective process and deterrent.

2.3.3 *Funding*

In our respectful opinion, it would be entirely inappropriate for either the World Bank or the International Monetary Fund to insist on the passing of the Corruption Control Bill and the Public Service (Code of Conduct and Ethics) Bill by way of conditionality.

3. THE BACKGROUND TO THE INSTRUCTION

On 4th January 2002 The Risk Advisory Group (hereinafter referred to as "TRAG") were instructed by the Government of the Republic of Kenya (hereinafter referred to as "the Government") to undertake a strategic assessment of Kenya's progress in anti-corruption initiatives following a tender exercise.

The historical background to the instruction is as follows:

Corruption has long been an issue in Kenya. Attempts to control the phenomena through legislation date back to 'The Prevention of Corruption Act 1956' (CAP 65 - Laws of Kenya).

In 1992 a specialist Anti Corruption Police Squad was formed by amendment to 'The Prevention of Corruption Act 1956'.

Following this, in 1997 and, again, by amendment of the original Act, The Kenyan Anti Corruption Authority was formed. This was subsequently disbanded.

In July 1988 following a resolution of the National Assembly, a Select Committee was formed, with a mandate that read:

"THAT, while appreciating the Government's effort to stamp out corruption both in public and private sectors and noting with concern that rampant corruption has become so pervasive that it threatens any further socio-economic development and the future of the country; aware that corruption has become so entrenched that the existing legal framework under the Prevention of Corruption Act (Cap.65) and the Anti Corruption Authority are not adequate to significantly reduce it or eradicate it; and noting further that corruption has kept away potential investors, and eroded the good image of Kenya; this House resolves to set up a select committee to study and investigate the causes, extent and impact of corruption in Kenya; identify the key perpetrators and beneficiaries of corruption; recommend immediate effective measures to be taken against such individuals involved in corruption and recover public property corruptly appropriated by them and the enactment of a Bill to provide for stiff penalties on all corruption related offences ..."

The Report of The Parliamentary Anti Corruption Select Committee was presented to Parliament in May 2000 (hereinafter referred to as "The Kombo Committee Report" and is produced at Annex 5). It made a number of detailed recommendations, some of which we will deal with below.

In December 2000 a Constitutional Court ruled that the KACA was an unconstitutional body. We understand that the basis of the ruling was that the KACA had been empowered to prosecute as well as investigate. This was held to be a violation of the Attorney General's constitutional position.

In August 2001 The Government sought, through Parliament, to change the Constitution and entrench the KACA. This failed.

As a result, in September 2001, a new Anti Corruption Police Unit (hereinafter referred to as the "ACPU") was formed. The ACPU took over substantial numbers of staff and strategic plans that had been developed by the KACA as well as a number of investigations and prosecutions. Its precise mandate was to:

"...investigate all corruption and corruption related offences either at their own initiative and/or as directed by the Attorney General and/or the Commissioner of Police" (see Annex 6 - Press release from the Commissioner of Police dated 13/09/2000).

The Government now intends to present two Bills to Parliament for approval: The Corruption Control Bill (formerly the Anti Corruption and Economic Crimes Bill) and The Public Service (Code of Ethics and Conduct) Bill. It is no longer seeking to amend the Constitution.

In short, over the last ten years there have been repeated attempts, through the formation of different bodies and enabling legislation, to take control of the issue of corruption. These have not been successful. The Government is about to embark on another initiative.

It is this initiative, and the proposed execution of it, which we have been asked to review and comment on.

It is appropriate to point out that pressure to address the corruption issue has come from both within the country but also from without. In particular, Kenya has been subject to a series of demands by the multilateral institutions as well as donor states to make reform in return for the restoration of financial assistance.

To this extent we have been asked to both receive comments and to prepare a strategy which is acceptable both domestically and internationally.

4. FINDINGS

The first Term of Reference required TRAG to:

*"...confer with the Government of Kenya, Political Parties, Domestic Interest Groups, Local and International Business and Financial Institutions on **their** view regarding existing Kenyan measures and mechanisms for combating corruption and what may be required to improve them, with a view to having an effective machinery and strategic plan to combat corruption which is credible nationally and internationally".*

The results set out below are based both on the interviews conducted and the documents reviewed. The Kombo Committee Report (see *Annex 5*) and a draft report prepared by the ACPU dated 2001 and entitled "A Situation Analysis of the Knowledge, Attitude and Perception of the Fight Against Corruption in Kenya" (see *Annex 7*) were particularly relevant to us and helpful in determining people's views and in formulating our own views.

Before descending to the detail of comments made we should report that, although in some instances there was a very significant degree of scepticism about the fact that a group of experts had been appointed to review the situation against the previous background of failure and in the light of the forthcoming elections, almost all of those interviewed were genuinely helpful and only three individuals refused to see us.

This scepticism was not shared by the multilaterals and donor states who expressed positive support for the initiative by publicly stating that it was "a step in the right direction."

Everyone interviewed expressed a conviction that immediate action was necessary to progress matters, although there was some genuine dispute in relation to some of the highly contentious issues, in particular the issue relating to "amnesty".

However, there was a lack of understanding of the scale of the task required to address corruption and the resource requirements that would be necessary. The multilaterals specifically stated that they had neither the background nor the expertise to make judgements on the legislation and strategic plans presented to them by the Government to control corruption.

Almost everyone interviewed was, for example, surprised at the fact that it took seven years to control syndicated corruption within the Hong Kong Police Force after the establishment of a specialist unit. They were also surprised that, 26 years after its inception, the unit had a staff of 1,350 who remain dedicated to the fight, even though the population of Hong Kong was approximately 7 million people. Kenya's population is now in excess of 30 million.

It is right to point out that we formed the view that there is a genuine opportunity to make substantial progress in the fight against corruption. There was cross-party political consensus in respect of the main recommendations we set out below.

It is also right to report that at no stage did the Government seek to interfere with our research. Indeed, in one instance where resistance was met, the Attorney General took steps to resolve the matter.

4.1 CORE THEMES FROM INTERVIEWEES

During the interview process there were a number of core themes which repeated themselves and which were reinforced by the independent research that was available to us:

4.1.1 *In Relation to Corruption*

That corruption was adversely affecting Kenya both domestically and internationally

It was expressly stated by almost all of those interviewed that corruption was adversely affecting Kenya both domestically and internationally.

Senior politicians, for example, spoke of the direct impact of corruption on inward investment.

The multinationals who provided us with information gave examples of how corruption was directly affecting their daily business lives, increasing costs of production and distribution. All indicated that the position was getting worse rather than better. Many expressly stated that it was causing their head offices to make no further investment within Kenya and some were considering withdrawal.

In the ACPU study (at Annex 7) 95.4% of respondents reported that corruption within Kenya had become a major problem.

That corruption was becoming much worse in that it affected almost every aspect of daily life for ordinary Kenyans and was an increasingly common factor in their lives

We were told that up to 25% of the average Kenyan's income was paid across in bribes of one form or another. We were not in a position to confirm this statistic and particulars of the research methods were not provided either.

However, the ACPU study revealed that 75% of respondents had witnessed corrupt activity. 60% reported having been victims of it. Of that 60%, 49.9% reported having paid a bribe in order to get a service from a civil servant in a public office.

That no section of the community was immune from it and that people from all levels of society were involved in corruption and that it was not restricted to one particular group

The ACPU study concluded:

This study has found out that the knowledge of corruption in Kenya is very high. It runs through all ages, genders, professions, social settings and all the environments that Kenyans live in.

That there were great concerns about the independence of the judiciary and the application of the rule of law

There was unanimity amongst all interviewees that the judiciary lacks integrity and is corrupt. This sentiment was expressed across the political divide, the business community, the religious community and other interest groups. The Chief Justice did not share this view.

The multinationals expressed extreme concern about their inability to rely on normal civil legal process to protect their contractual rights. They also complained that the court system was being used corruptly by employees. Domestic bankers echoed this concern. In particular, they said it was almost impossible to enforce security when debts were not repaid.

A former advisor to the KACA went so far as to state that when consideration was being given to the appointment of a Judge to head the KACA, out of all of the judges within Kenya only three were considered to be untainted by corruption.

The Kombo Committee Report went much further. At p. 41 (see *Annex 5*) the report states:

“There is, in actual fact, an unwritten secret pact among civil servants, police officers and the judiciary for mutual protection in the event of any conviction on corruption”

54% of the respondents to the ACPU study said that they would not report any incidence of corruption if they witnessed one. 12% said if they made a report no action would be taken.

We would comment that the rule of law is the most important ingredient in the fight against corruption. If there is no confidence that the judiciary will apply the rule of law in cases brought before them then the situation is critical.

In addition to affecting the disposal of cases, integrity within the court system is an essential pre-requisite of investigation or corruption and economic crime cases.

There is, in our view, little value to be obtained from improving the investigation and prosecution process if, as appears to be the case, the courts fail to dispense justice.

The lack of confidence in the judiciary separates Kenya's position from that of Hong Kong and all other states where an independent commission against corruption has been created and been successful.

In our view, this issue must be addressed before all others if any anti-corruption strategy is to have a chance of success.

That professionals were widely involved in corruption and had failed to regulate themselves through their professional bodies

Many of those interviewed made the point that corruption could not occur if professionals were not involved. The Kombo Committee Report found that lawyers, engineers, valuers, surveyors, architects, accountants and auditors were all identified as being perpetrators or facilitators of corruption (see *Annex 5* – p. 44).

This calls into question whether these groups are capable of and competent to regulate themselves.

That the Government was not doing enough to address the problem

We were told, time and time again, that the primary failure to address the issue of corruption was that of the Government. There was a very significant level of scepticism, outside Government Ministers, as to the Government's true intentions. Many expressly stated that senior Government officials were themselves corrupt and unless and until this issue was addressed there was little prospect of change.

We were expressly told that we were being used as a tool by the Government to attempt to mislead the multilaterals into resuming funding because the multilaterals would form the view that "something positive" was being done.

The multilaterals' position was that they were looking for positive acts rather than words from the Kenyan Government or studies from external experts.

Most believed that the Constitutional Court ruling was the result of the executive influencing the judiciary. **This suggestion was denied** by the Chief Justice.

That it would be acceptable for external expertise to become involved in helping to address the problem providing that the parameters of the nature of the help and the duration were clearly defined

There was a general acceptance that external expertise would be beneficial in seeking to resolve the challenge now facing Kenya. Some of those interviewed, including Government Ministers and Opposition Leaders, expressed the view that it was critical to inject independence as well as expertise into any structure that was intended to address the corruption issue.

The theme of independence was repeated by the majority of people we spoke to as being a necessary ingredient to move any strategy forward. People from all parties, and from all other constituencies we spoke to, said that, by introducing external expertise, the Kenyan people would be more accepting of investigations, prosecutions and trials than if they were being conducted by Kenyans.

That something needed to be done quickly to bring the situation under control

There was a general feeling that Kenya was running out of time. A number of attempts had been made to address the issue of corruption. Each was perceived, for a variety of reasons, to have met with failure. Each new initiative met with an increasing level of scepticism. In our view, it is likely that with each failure, people were more likely to become corrupt than if an effective deterrent was put in place. This view is supported by the ACPU study.

People from all constituencies expressed the view that Kenya could not afford another failed attempt to deal with the problem.

The multilaterals and the donor states are clearly running out of patience, as are the multinationals.

4.1.2 In Relation to the Existing Measures and Mechanisms for Combating Corruption

The constitutional challenge to, and demise of, the KACA was seen by almost everyone interviewed as a very significant set-back in the fight against corruption.

As previously stated, many expressed the view that the decision of the Constitutional Court was directed by the executive rather than being based on a proper interpretation of the Constitution. This was denied by the Chief Justice. All saw the ruling as a very retrograde step.

Within the ACPU study 42% had heard of the Court's decision. Of these, 95% said that, following the ruling, corruption will tremendously increase because "there is no authority directly responsible for spearheading the fight against corruption".

100% of those interviewed within the ACPU study responded by saying that the KACA needs to be independent for it to effectively fight corruption.

There was little understanding of why the Attorney General had decided not to appeal the decision and criticism of him for taking this position

The lack of appeal was used to support the twin arguments that there was not political will to address the corruption issue and that the executive, rather than the judiciary, were determining the law.

There was no comment on, and therefore acceptance of, the Attorney General's press statement following the Court ruling that an appeal was not legally permissible (see *Annex 4*).

Significant scepticism was expressed by all non-governmental interviewees as to the role and effectiveness of the ACPU. Particular concern was expressed at the fact that the ACPU was fundamentally a “police unit” in an environment where police were seen as fundamentally corrupt

There was a substantial belief expressed by those interviewed that the police within Kenya are fundamentally and systematically corrupt.

29% of those who admitted to have paid a bribe within the ACPU study said they had paid a bribe to the police.

Some of the junior staff within the ACPU who were not police officers expressed a concern that their professional reputations would become damaged because they were working within a police unit and, therefore, they would be “tainted” as individuals.

Against this background, and for reasons identified below, it is our view that the ACPU must be enhanced if it is to be effective. Furthermore, it will have difficulty in retaining the young experts that it clearly requires to discharge its function.

Concern was expressed as to whether the ACPU would be effectively supported by the Attorney General’s Office in prosecuting those alleged to be corrupt

Doubts were expressed by a large number of interviewees as to whether the Attorney General’s Office would provide the legal support required for the ACPU to be effective. Many openly stated that if charges involved senior politicians it would be unlikely that the case would be allowed to progress by the Attorney General’s Office.

The Attorney General stated that his Office would not do anything other than make decisions according to the evidence put before it. He did, however, indicate that he had very limited resources and that those resources had limited experience. He cited, for example, the fact that only three prosecutors belonging to the Attorney General’s Office were located outside Nairobi.

We deal with this express concern below under the heading “Politicisation”. At this point we would simply comment that those who expressed the concern were unable to provide details and our independent research established a contrary position to that being asserted.

We requested a number of statistics from the Attorney General’s Office in relation to the number of prosecutors, the number of criminal cases brought each year and some detail of case disposals. At the time of writing the report, these statistics were not available due to lack of computerisation within the Attorney General’s Office.

Fundamental concerns were expressed as to the independence of the judiciary and, in particular, whether the rule of law would be applied in all cases brought before the courts

We have already recorded the comments of some of the interviewees in relation to this point above.

The Chief Justice defended the position of the judiciary. His opening position was that the courts would determinedly apply the rule of law in all cases. This meant that they would not convict in cases where the evidence was insufficient. He gave examples of evidence being insufficient through poor investigation. He also said that, in some cases where the evidence was available, the cases were badly prosecuted. This meant it was not adduced before the court and if it was not put before the court it could not be considered.

The Chief Justice stated that the Attorney General's Office is under-staffed and therefore was forced to use police officers to prosecute serious cases. He also criticised both the prosecution and the defence for repeatedly asking for adjournments in cases. He said that he had given instructions to his staff that if too many adjournments were asked for by the prosecution the case should be thrown out.

The Attorney General concurred that his Office was under-resourced.

Finally, he blamed the prisons for not making prisoners available when cases were set for trial.

We asked for statistics to support his propositions but these were not forthcoming at the time of writing this report.

We have been told anecdotally that it takes between two to five years for criminal cases to be disposed of by the courts. We have also been told that people can spend up to eight years on remand in prison awaiting trial.

If these figures are accurate, it is our view that there is a substantial risk that any anti-corruption initiative will be undermined. Prosecution, trial and, if convictions are secured, punishment, must ensue quickly after the initial investigation if the public are to believe an effective deterrent is in place.

In addition to the integrity of the judiciary, the "process" issues must also be addressed.

We suggested to the Chief Justice that one way of dealing with the issue was to create an independent commission with appropriate investigatory powers, a specialist team of prosecutors and special courts with special judges. Whilst the Chief Justice accepted the need for the first two propositions, he rejected the concept of special judges.

Furthermore, he rejected the suggestion that there should be ring-fenced funding for special courts. The basis for his argument was that funding for special judges would create an “elite judiciary” which was not appropriate and that ring-fenced funding for special courts would, in some way, interfere with the application of the rule of law. In particular, he seemed to suggest that if multilaterals provided funding for special courts and expert judges this would inevitably lead to a requirement on the courts to convict, irrespective of the state of the evidence. He was alone in this proposition.

Without exception the issue of “amnesty” was raised as a critical issue to be resolved before matters could proceed.

Views on this highly emotive issue ranged considerably.

One politician made the point that “amnesty” was the wrong word because it implied that conviction either had been, or could be, obtained: this was not the case and, in fact, the position was that a series of allegations were being made without being tested in a court of law. Therefore, to start with, the premise of amnesty was both legally and philosophically wrong.

Other politicians expressed the view that it was too difficult to look back because so many individuals had been involved in corrupt acts for so long. Therefore, it was impossible to investigate all cases and by selecting individuals to prosecute one was open to the real criticism that the prosecution was “not fair”, at best, and “politically motivated”, at worst.

Some went as far as to suggest that if selected prosecutions were brought it could result in conflict and a breakdown of public order within Kenya.

Others expressed the view that it was right and proper that those who were prosecutable should be prosecuted and that no amnesty should be considered.

Some expressed the view that there should be an amnesty subject to certain terms and conditions. At one extreme, these were expressed to be the repayment of the amounts originally obtained and all of the accrued interest thereon and, at the other, that the person concerned should simply pay the tax on that which he obtained corruptly.

The ACPU study revealed that 65% of the respondents did not believe that an amnesty should be granted, while 31% believed that it should. But a significant percentage of the 31% believed that amnesty should be conditional on repayment of the benefit that accrued.

The Kombo Committee Report deals with the issue of amnesty (see *Annex 5 pp. 65-68*) and rehearses some of the arguments identified above.

The Kombo Committee Report recommended an amnesty for pre 31st December 1972 cases because:

“This date marks the commencement of major practices of corruption and economic crimes which arose after the implementation of the Ndegwa Commission”.

For offences that occurred after December 1972 it recommends:

“... that all perpetrators that own up within one year and who agree to surrender corruptly acquired gains, or to disclose their corrupt practices and their accomplices, be treated leniently by the KACA provided they pay taxes, duties and other statutory levies they may have avoided”.

It is right to say that there were a number of issues that were not focused on by those with whom we discussed this issue prior to our raising them.

The first issue was the paramount importance of the rule of law and, in particular, the principle that no individual should be convicted of a criminal offence, unless sufficient admissible evidence was placed before a properly constituted court of law that proved the individual's guilt beyond reasonable doubt.

Whilst people were accepting of the proposition, their acceptance did not recognise the fact that Kenyan law only required books and records to be kept for six years. It also did not recognise that there were difficulties in obtaining records from overseas jurisdictions and that, in respect of older cases, witnesses may have died. In short, there would be significant evidential difficulties in investigating and prosecuting cases that were more than six years old.

Furthermore, there was a lack of appreciation of the resources required to investigate and prosecute cases.

The Kombo Committee Report recommended that in cases alleging corruption the KACA investigate and, if appropriate, prosecute the approximately 190 cases that involved hundreds of individual defendants. Some of the cases involved many billions of Kenyan Shillings.

To place this recommendation in context, since its inception in 1997 the KACA and then the ACPU, have had approximately three operational years in which to investigate and propose for prosecution cases. In this period, 130 cases have been or are being investigated and 31 prosecutions have been initiated. That is, approximately 10 prosecutions per year. With its current resource base, and assuming that no further cases are identified as being worthy of investigation or prosecution, it would take the ACPU between ten and twenty years to work through the cases identified by The Kombo Committee Report as being worthy of investigation and prosecution.

Whilst these statistics are “crude” they do serve to make the point that, from a purely logistical perspective, it is not tenable to require any new investigation or prosecution unit to take on such a monumental task.

There is learning on this issue available from Hong Kong. The Independent Commission Against Corruption was established in Hong Kong in 1974. Its original mandate was to investigate all corruption allegations irrespective of when the alleged corruption took place. The primary target for its activities was the Hong Kong Police Force and other disciplined services where corruption had reached the same level as is now apparent in Kenya.

Three years after it started its work, the Hong Kong Police Force rioted and raided the Independent Commission's Headquarters, attacking its officers and destroying documents. In response, the British Government, faced with civil disorder and threatened invasion by the Chinese Army, changed its policy.

Essentially, it granted a limited amnesty which was conditional on individuals not committing any further acts of corruption. If, however, they were suspected of a new act of corruption their former 'crimes' could be investigated and prosecuted as well.

Secondly, the British Government gave the Governor of Hong Kong the power to investigate past acts if the alleged crime was so heinous that it demanded investigation. In the following 26 years only one such prosecution was authorised: this involved the construction of 29 public housing blocks with defective material which put at risk many thousands of lives. The alleged corruption dated back approximately 20 years and convictions were secured.

In Botswana no amnesty was granted but the level of corruption and the duration over which it had been perpetrated was not comparable with Kenya.

We voice no view as to what policy the Kenyan Government should adopt in relation to this specific issue. We would simply advise that any solution must be arrived at which supports the overriding obligation to maintain the rule of law and which pays appropriate regard to the limited resources that Kenya has available.

In our respectful opinion, it would be entirely wrong to invite a new independent commission against corruption to try and investigate past matters in the absence of sufficient resources. To do so would only lead to public perception of failure and a renewed lack of confidence.

Some Commonwealth nations are moving away from the exclusive reliance on criminal prosecutions to recover "unjust enrichment" from suspected criminals. At *Annex 8* we attach a paper, entitled "The Recovery of Corrupt Benefits of Crime", on this initiative for consideration. Such a device may produce an acceptable compromise position but would have material resource implications and involve establishing a separate body.

Concern was expressed as to the form of the Anti Corruption and Economic Crimes Bill, in particular, whether it would be an effective tool or simply a weak piece of legislation

Everyone we interviewed expressed the hope that the Anti Corruption and Economic Crimes Bill would be an effective piece of legislation providing the new ACPU with appropriate powers.

It is worthy of report that the Government of Kenya applied for, and was provided with, aid to supply a parliamentary draftsman to improve the drafting of this piece of legislation. The individual concerned was interviewed. By the time the reviewing team had been supplied with the parliamentary draftsman's work product by the Attorney General, the Bill's title had changed to 'Corruption Control Bill 2002'. We have reviewed this piece of draft legislation and our detailed observations are set out below.

4.1.3 In Relation to What May Be Required to Improve the Measures and Mechanisms for Combating Corruption:

Every non-governmental interviewee, including the multilaterals and donor states, stated that the critical issue in fighting corruption within Kenya was the "political will" to fight.

In this regard it is appropriate to point out that we entirely support the proposition that leadership on this issue must come from the Government. We were concerned however at the perception given by a number of people, including professional bodies, that we interviewed, that the Government had sole responsibility to address the issue.

This perception is reinforced by comments made in Chapter 8 of the ACPU study (see *Annex 7* – p. 32). The section reads:

"There is a general tendency for Kenyans to surrender very easily and shy away when it comes to matters of national concern and mostly those that do not have an immediate and direct effect on them. This has resulted to a majority of people relegating responsibility to participate in solving problems that may have arisen from such situations to a second citizen while they take a wait and see position. Principally, there is a probability that the court's ruling could have amplified this scenario to the worst - the argument here being that (the) majority are already discouraged when it comes to the fight against corruption and feel that the cause has betrayed them and their hope is gone..... Focused Group Discussions gave a very clear picture of the true feelings of Kenyans at the moment - a grim state of capitulation and despondency"

It is our respectful view that if corruption is to be effectively addressed within Kenya the public must be educated to accept their responsibilities not to become involved, either as victims or perpetrators, and they must assist the authorities in fighting it.

This means they must report attempted corruption and be prepared to give evidence.

Whilst leadership must come from the Government, political will must involve everyone included in the body politic: this means every adult Kenyan citizen.

The level of the despondency reflected in the ACPU study statistics means that there will need to be a substantive public education programme to reinforce the public's obligations.

Assuming the necessary political will, the primary measures identified for combating corruption were:

- *Corruption Drivers*

Reform of the Ndegwa Commission Report 1972 which sanctioned civil servants engaging in private business whilst holding office.

This was rightly identified by The Kombo Committee Report as a major factor in the escalation of corruption within Kenya. The ability of civil servants to have business interests which place them in conflict, directly or indirectly, with their official positions is entirely untenable.

The institution of asset registers and a code of conduct for senior civil servants is not, in our respectful view, a sufficient answer to this fundamental problem. Whilst we recognise the real economic difficulties involved, it is our express recommendation that the Kenyan Government reverses the decision of the 1972 Commission. Specifically, civil servants should not be permitted, directly or indirectly, to have business interests. This will clearly take time to effect but must be addressed.

In addition to this prohibition, we support the recommendation that asset disclosure is made by senior civil servants. We set out below our observations on the current proposals in this regard.

- *Abolition of the Harambee*

The Harambee spirit is a traditional Kenyan value of mutual support that appears to have been corrupted over time. Initially meant to be a way in which everyone could provide additional financial support for public works such as schools and hospitals, The Kombo Committee Report found that it:

“has been grossly misused and has led to tremendous wastage of funds in unplanned and unsustainable projects”

“Harambee has, moreover, been a source of bribery and extortion. It is used unfairly to political advantage by both voters and those who seek elected positions” (see Annex 5 - p.69).

Senior politicians, bankers and civil servants spoke of the extreme pressure they come under to support Harambee. They all indicated that their salaries did not provide sufficient resources to make the level of payment that was expected by the public. One individual said he dealt with the problem by ensuring that his secretary did not pass on Harambee requests to him. He could therefore always state, without lying, that he was 'not aware' of the request.

Others expressly stated that receiving corrupt payments was seen by many as a legitimate way of meeting demands for Harambee payments: in essence, an unofficial tax redistributed for good causes.

In relation to elected officers, the pressure to contribute was seen as being greater than non-elected officers. Some expressly indicated that contributions were seen as a tool to ensure re-election.

Even if it were the case that all sums taken by politicians and others in order to fund their Harambee obligations were, in fact, redistributed, this is a wholly inappropriate way of raising funds to discharge Government obligations.

We support the recommendations contained in The Kombo Committee Report (see *Annex 5* - p. 76) for the reform of the Harambee system for the reasons given.

Increasing public sector salaries specifically in areas connected to the machinery of justice

Everyone connected with the machinery of justice, from the Chief Justice down to police constables, complained about their salaries.

We asked for detailed statistics on this point and they were made available in respect of both the judiciary and the Attorney General's Office, but unfortunately not for the police service.

In relation to the judiciary, we understand that agreement has been reached to raise the salaries of senior judicial officers and improve other terms and conditions (see *Annex 9*). However, this agreement has not, as yet, been implemented. In addition, the agreement does not touch on the 274 magistrates who dispense the vast majority of justice within Kenya. Their salaries are very low and we understand the position is about to be made worse by the replacement of housing with a housing allowance which is insufficient to provide housing needs.

The Chief Justice expressly stated that he could not say this was a factor behind corruption within the judicial process.

We are of the view that, inevitably, it is likely to be a material contributory factor. Police officers are also incredibly badly paid. We were told that many officers in Nairobi live within the shanty towns and cannot pay for basic education and medical aid for their children. Given the level of discretion they hold this is clearly an untenable position and, in the long term, must be addressed.

Similar observations regarding salary were made in relation to the civil service, although with less force.

In relation to the Attorney General's staff, the salary levels are also low and should be reviewed.

We appreciate that Kenya has limited financial resources. We would, however, recommend that financial priority be given to those engaged in the provision of all elements of the criminal justice system.

4.2 CORRUPTION CONTROL

4.2.1 *Improvements In Effective Systems And Controls On Governmental Expenditure*

This was raised by a number of individuals we spoke to. The Controller and Auditor General, however, pointed to the fact the issue was not a lack of rules and controls but rather the failure to comply with the rules and controls that were in place at the highest level.

His report on The Appropriation Accounts and Other Public Accounts for the Year 1998/99¹ provides a number of examples of failure by the Government and Government Departments to properly comply with accepted rules and standard accounting policy.

For example in paragraph 1 he states:

“All issues from the Consolidated Fund against receipts in the Fund were authorised by me as required by Section 105(2)a of the Constitution of Kenya. However, as stated elsewhere in this Report an amount of K£100,000,000 due and receivable into the Consolidated Fund as dividends from the Central Bank of Kenya was instead, on Treasury instructions, paid to the National Bank of Kenya without Parliamentary approval and contrary to the Constitutional requirement that all revenues or other monies raised or received for the purposes of the Government of Kenya shall be paid into the Consolidated Fund”.

We would make the obvious point that, if the Government is seen to be publicly failing to comply with the Constitution and standard accounting policies, it will be very difficult to persuade others that rules have any meaning.

It is our recommendation that, whilst there is always the opportunity to improve systems and controls, effort should be concentrated on compliance with the existing rules rather than on the imposition of new bureaucratic structures.

4.2.2 *The Creation Of An Effective Deterrent To Control Abuse Of “Discretion”:*

All of those interviewed expressly stated that the creation of an effective deterrent went to the heart of the anti-corruption debate.

There was a general recognition of the fact that a significant proportion of the Kenyan population were accepting of corruption and, if placed in a position where they could profit by abusing discretion vested in them, they would.

Our review of complaints to the KACA and ACPU supported this view. These have been scheduled and are produced at *Annex 10*.

¹ The Report of The Controller and Auditor-General together with the Appropriation Accounts, Other Public Accounts and the Accounts of the Funds for the Year 1998/99

For those interviewed, the creation of an effective deterrent meant a fundamental review of the investigation, trial and enforcement elements of the criminal justice system.

In particular, it meant the creation of an Independent Anti Corruption Body with appropriate powers. Whilst the KACA was seen as a major improvement in the then existing machinery, concerns were expressed about the dismissal of the first Director and police involvement at an operational level. Little confidence was expressed by anyone we spoke to in relation to the Anti Corruption Police Unit.

4.2.3 The Capability To Have An Effective Prosecution

The second issue that was raised was the role of the Attorney General's office and the requirement for independent qualified prosecutors. The KACA sought to deal with this through the integration of the prosecution role. As discussed previously, this resulted in a successful constitutional challenge.

There was a clear theme from the majority of those interviewed that suggested a lack of confidence in the transparency of decision making within the Attorney General's Office and, in particular, a suggestion that senior politicians and civil servants were not prosecuted because of who they may be politically connected to.

This was not supported by our research.

4.2.4 The Creation Of Economic Crime Courts

This was a recommendation of The Kombo Committee Report and was generally supported by all those we spoke to. We understand that this has been initiated by the Chief Justice and two such Courts have been established in Mombassa.

We doubt, because of questions concerning the integrity of the judiciary, that the creation of special courts is an adequate response in and of itself.

4.2.5 An Anti Corruption Education Programme

Again, it was generally stated that there was a need for an effective anti corruption education programme.

4.3 THE APPROPRIATENESS OF EXISTING PLANNED APPROACHES

Our second term of reference required TRAG to:

“Assess the appropriateness of existing planned approaches, programmes and activities for enforcement, public awareness/sensitisation and corruption prevention, designed to promote good governance.”

In order to fulfil this requirement, and because of its central role in delivering the Kenyan Government’s anti-corruption initiative, we conducted a preliminary review of the work of the ACPU.

In addition, we interviewed those involved in, and formed views on, the elements of the criminal justice system that supports its work, namely the courts and the prison service.

Our detailed findings are set below.

Our general observations of “the appropriateness of existing planned approaches, programmes and activities for enforcement, public awareness/sensitisation and corruption prevention, designed to promote good governance” are as follows:

It is our respectful view that in order to be effective the current Kenyan Government approach to combating corruption must consider:

- a) The primary corruption drivers identified above.
- b) That there must be a realistic appreciation of how much effort will be required to change what has become a major endemic issue. Short time-lines with very limited resource support are entirely unrealistic.
- c) The problem is of a magnitude that significant policy decisions need to be made.

In particular we believe:

- a) The Ndegwa Commission’s findings need to be reversed
- b) The Harambee system needs to be fundamentally reformed in accordance with The Kombo Committee Report’s recommendations
- c) There is a requirement for a fully independent commission against corruption which is adequately resourced with appropriate technical skill and financial support.
- d) There is a need for a specialist prosecution unit which is adequately resourced and whose decisions are transparent

- e) There is a need for special courts resourced with judges with the appropriate background and experience. There may also be the need for a special appellate court structure
- f) There is a need to reform the custody arrangements of those charged with economic crime and corruption offences
- g) There is a need for a proper education and prevention programme
- h) The Government, Government departments and parastatals must all start to comply with the systems and controls that are in place to control their expenditure

We doubt whether the Kenyan Government has sufficient resources to create and execute an effective strategy against corruption. Material long-term financial support is therefore necessary from the multilaterals and donor states.

In relation to the ACPU we have the following observations:

- a) Its leadership must understand its mandate and be fully capable of giving effect to it;
- b) The leadership must be well versed in the three pronged approach to mitigating corruption and the relationships between each element of the approach;
- c) The ACPU must gain the public's acceptance that it is an appropriate tool to give effect to its policy given that it is a "police unit".

This justification for these recommendations is generally set out in our findings in Section 1 of this report and based on our analysis of the ACPU and courts' structure in Section 2.

4.4 POLITICISATION

It is inevitable that the issue of corruption, and how to resolve it, has become highly politicised within Kenya. It is our view that politics, rather than considered debate, has influenced many of the arguments that have been advanced on important issues.

This has included a deliberate lack of willingness to accept facts where they do not support political arguments. One example of this position is in respect of the stated perception that the Attorney General's Office will not support prosecutions of high-ranking politicians and civil servants.

In order to test this allegation we sought specifics from those interviewed who made this allegation. They were unable to substantiate the claim with examples.

In its first annual report the KACA stated, in respect of this specific issue, that:

"no problems have been experienced in this regard" (see Annex 13 – p. 21)

Finally, we have reviewed the list of prosecutions actually being pursued by the Attorney General's Office. These include:

- a current Cabinet Minister,
- three former Permanent Secretaries, and
- a number of District Commissioners

We produce at Annex 11 a list of those being prosecuted by the Attorney General's Office, either as a result of investigation by the KACA, or the ACPU.

In short, the evidence does not support the allegation of political interference.

It is our respectful view that Kenya stands the greatest prospect of moving forward in its fight against corruption if the issue can be depoliticised. As we have reported elsewhere, as a result of our discussions, we do believe that there is a real opportunity to achieve a broad based consensus.

4.5 THE ACPU – AN OVERVIEW

During August 2000, the Kenya Government, by virtue of the Constitutional Amendment Bill, sought to entrench the Kenya Anti Corruption Authority (hereinafter referred to as “KACA”) within the Constitution. The proposed Constitutional Amendment Bill failed with the result that the KACA was declared unconstitutional by a Constitutional Court on 22nd December 2000.

Following this reversal His Excellency The President of the Republic of Kenya ordered the formation of an anti-corruption unit within the Police Force, the ACPU. This unit is headed by a Deputy Commissioner of Police and commenced its operations on 13th September 2001 from the Unit’s base at Integrity Centre, PO Box 61130, Nairobi, Kenya.

Within a few weeks of its inception in November 2001 the Unit produced a Strategic Plan to cover the period January 2002 to December 2004 stating its aims as follows:

4.5.1 Purpose

The purpose of setting up the ACPU is to ensure that:

- a) the Government’s commitment to achieving zero tolerance for corruption is fully implemented in all its aspects and
- b) the work began by the KACA in investigations, public education, research and preventive services continues.

4.5.2 Mandate

The mandate of the ACPU is to:

- a) investigate corruption and corruption related cases and take necessary steps as prescribed by law
- b) take necessary measures for prevention of corruption in the public and private sectors
- c) advise the Government, parastatal organisations and other public bodies on ways and means of preventing corruption
- d) create public awareness on the effects of corruption and
- e) enlist and facilitate participation of members of the public in fighting corruption

The strategic plan was, in substance, a simple re-labelling of the plan produced by the KACA.

It is generally accepted that for an anti-corruption unit and initiative to be effective it must have the following attributes:

- a) political leadership and support which must come from the President’s Office and have wholehearted Government support;

- b) public support and participation, including representation on advisory committees;
- c) operational independence;
- d) must apply the “three pronged” attack strategy on corruption of investigation, prevention and education;
- e) there must be effective legislation providing adequate powers to the authority to undertake its task and enable it to operate impartially;
- f) the Unit must have adequate financial, human and other resources.

In addition, the ACPU must be supported by an independent judiciary.

Any deviation from these principles will materially adversely affect any initiative taken and will undoubtedly incur adverse public reaction.

We have reviewed several aspects of the work of the ACPU since its inception on 13th September 2001 and also the previous work of the KACA. We have also spent a considerable amount of time talking to the younger element within the ACPU, particularly those who joined the KACA from the private sector.

We are of the view that:

- a) There is the need for understanding at the most senior levels of the Organisation of its mandate. Many very serious allegations of corruption are referred out in some instances to be investigated by the very organisations alleged to be corrupt (see for example *Annex 10 - 2001 Intsum* - cases 17, 21, 36, 37, 46, 49, 52, 63, 67, 69, 85, 92, 100, 112, 113, 114, 122, 127, 138, 143, 145, 146, 149, 151, 166). In others, where the ACPU clearly has a mandate, it appears that senior officers do not recognise the fact (see *Annex 10 - 2001 Intsum* – cases 75, 82, 104, 105, 106, 116, 125, 131, 132, 148, 162, 171).
- b) There is a need for transparency and urgency in assessing a complaint on arrival within the Unit and moving it to investigation status. For example, complaints dated as far back as October 1999 are still not yet allocated for investigation. The Unit was unable to indicate how many cases it still had to review.
- c) There is a need for better direction in co-ordinating the three departments to a common aim. Indeed, the Prevention and Education Departments are not privy to, or party to, assessing complaints on arrival to the Unit. Such an involvement would allow them to formulate policy in respect of problem areas.

- d) The commitment to achieving zero tolerance must be evident. We reviewed a considerable number of cases which manifestly should have been accepted as pursuable investigations within the Unit but were sent out to Provincial Criminal Investigation Officers or other investigative authorities to deal (see *Annex 10*).
- e) Corruption prevention is an integral part of good management and to achieve this ideal prevention officers provide a service to identify and minimise corruption opportunities. The emphasis for the Prevention Department is to assist and help and not to investigate and browbeat. Two recent incidents demonstrate that the Prevention Section within the Unit is adopting an incorrect philosophical approach.
- f) When travelling around Nairobi there was not one single visual sign that an anti-corruption campaign had been initiated.
- g) The throughput of cases to the Attorney General's Office is very low. Since the inception of the KACA the twenty one cases have been, or are in the process of being, prosecuted (see at *Annex 12* the DCEC figures from Botswana with approximately the same level of staff). Little progress has been made by the KACA or the ACPU. This is evident from the statistics produced by the KACA in its first annual report which bears a striking resemblance to statistics provided to us by the ACPU (see *Annex 13*).
- h) We requested sight of these twenty one cases for review purposes but were only supplied with two files. These demonstrated a lack of supervision.
- i) The acceptance level of cases for investigation by ACPU is exceptionally low.
- j) The purported supervision of ACPU investigative staff is excessive whilst actual supervision is ineffectual. We were informed that the senior investigative rank is Chief Inspector; this provides an investigative resource of 50 officers within the ACPU. Above Chief Inspector rank are supervisory officers and lawyer crime readers. This totalled 14 staff. (See list of personnel at *Annex 14*). We were told that the same level of supervision applied during the KACA era. We established, from our discussions with the junior officers, that their workload is approximately three cases per person. In Botswana individuals carried nine cases per person with a better throughput to prosecution status resulting in an 85% conviction rate (see *Annex 12*).

- k) There is not one female investigator in the Unit. At the commencement of the Unit on 13th September 2001 there were two female investigators but both have been removed: one has been made a Crime Reader and one has been sent to Crime Intelligence.

The demonstrable lack of experience, knowledge and training is a critical deficiency in the ACPU and its predecessor, the KACA. As both Units were responsible for development and execution of strategy, by definition, both will be materially adversely affected unless the skill and experience required can be obtained from elsewhere.

Prior to leaving Nairobi on 4th February 2002 we had a very lengthy meeting with the Head of the ACPU, Deputy Commissioner Slim, and informed him of our views respecting these issues. He did not take exception to the points raised, merely stating that the Unit was formed only recently and that it took time to gather momentum and he referred, in passing, to the caseload taken over from the KACA.

He did, however, disagree with two issues: i) he considered that female investigators could create trouble in the Unit and ii) he quite strongly resented the assertion that the level of crime, or the rank of the person involved, required a senior rank to head the investigation.

For example, we informed Mr Slim that one of our consultants had personally headed the investigations in Botswana or Hong Kong when the suspect had been of Cabinet rank. We argued that it was both a presentational and leadership issue for the Authority to draw on the status of senior rank when a person of very senior political or Government rank was involved as a suspect. He did not agree.

On the basis of our research it is our recommendation that the Unit be recreated with, in the first instance, non-local police resources and appropriate levels of external expertise.

To recreate the Authority, the focus of direct recruitment should be held at two levels. The first is to engage qualified, mature and well motivated citizens of both genders, either direct from University or from among those who possess slightly less academic qualifications, but who, nevertheless, have drive, aptitude and determination, perhaps coupled with some experience of industry or business, since completing formal education. The second is to engage experienced, independent external advisors.

We are confident that this untainted level of recruitment, properly trained and resourced, and given experienced leadership, would, in a given space of time, defeat and turn around the problem of corruption and economic crime within Kenyan society.

4.6 PREVENTION - PRESENT ACTIVITIES OF THE ACPU PREVENTIVE SERVICES DEPARTMENT

4.6.1 *Staffing*

The Head of Preventive Services was recruited to the Kenya Anti-Corruption Authority in April 2000. When he was appointed there were no other staff in the Unit. A further five officers joined the Department in May. Subsequent to the disbandment of KACA, the new Preventive Services Department commenced operation in October 2001 as part of the new ACPU. The Department currently has an actual establishment of 14 officers, with authorised posts for a further four staff. Several of these members of staff had previously been employed in the KACA.

Although the existing staff are generally very well qualified: engineers, accountants, auditors, tax inspectors, etc., none of them has any practical experience in the prevention of white collar crime. The Head of the Unit and some other officers spent some time on attachment in Hong Kong, New South Wales, South Africa and Singapore, gathering information relating to systems for the prevention of corruption.

We were told that the Department has a relatively young workforce, as more senior individuals did not find the prospect of employment with the ACPU very attractive because of a perceived danger to themselves and their families.

Recruitment of staff presents a problem as all staff are recruited centrally by Government. The ACPU is then presented with a list of preferred candidates. The ACPU is therefore unable to recruit exactly the resources it believes it requires. All candidates are vetted by the National Intelligence Security Agency. All new officers are employed on a volunteer basis from within the rest of the civil service. No recruitment is allowed from the private sector.

The Preventive Services Unit has drafted a Code of Conduct for all ACPU officers. It is considered necessary for this to be finalised and implemented at the earliest opportunity.

It is our view that recruitment for this specialised unit be totally divorced from the normal civil service recruitment programme. With the setting up of an entirely independent unit the Organisation should be able to determine its own recruitment policy with the authority to engage specialist staff and also to terminate those staff that are not performing to the required standards.

4.6.2 *Assignment Work – The Stated Policy*

Corruption prevention assignments are undertaken either as formal examinations or as risk assessment studies; the former being much more comprehensive than the latter. Assignments are initiated either by invitation from the organisation concerned, or at the initiative of the Corruption Prevention Department, with subjects selected from their priority list. Areas for examination are prioritised using material from reports in the press and reports from the public alleging corruption.

The timing of assignments is determined by the availability of staff. Approval of the Director is obtained before detailed preparations are made.

An official notice is sent to the head of organisation concerned advising him of the assignment. Normally the Director signs this notice.

With input from the client, a work plan is devised and a budget calculated. This work plan contains the terms of reference, scope and details of the methodology to be used.

All members of the Corruption Prevention Team are briefed and the head of the client organisation sent an official notification of commencement of the assignment.

The media may also be advised of the commencement of the assignment.

Corruption prevention assignment reports are drafted by the assignment team, referred to the Head of Prevention Services and approved by the Director. They are submitted to client organisations and detailed recommendations are discussed and agreed. Copies are sent to the Head of the Civil Service for information. A timetable for implementation of recommendations is agreed with the client. Subsequent checks are made on the implementation of recommendations, which may be modified if extenuating circumstances exist.

4.6.3 *Assignment Work – The Practice*

A review of five assignments, carried out by the Corruption Prevention Department, was conducted and the findings are below.

4.6.4 *Ministry of Education, Science and Technology*

This assignment report examines the processes for application and allocation of Bursary Funds; Official Overseas Travel; Admissions to Primary Teachers' Colleges and Admissions to Secondary Schools. The report clearly identifies widespread abuse of the system by officials and public officers to the extent that the underprivileged and deserving applicants are being deprived. It also illustrates that significant financial resources are being misappropriated. A complete lack of specified procedures and a total lack of supervision and accountability facilitate the situation.

4.6.5 Teachers' Service Commission

This report covers the subjects of "Transfer of Teachers" "Teachers' Promotion" "Payment of Salaries" and "Budgetary Control". The report clearly identifies that there are no well-defined procedures or specific policy relating to most of these duties. Ad hoc methods of operation are used and discretion is widely exercised by staff. Boards' of Governors often comprise poorly educated people and the "rubber stamp" method of approval for staff decisions is used. Teachers are often promoted through political influence, sometimes when vacancies do not exist. The processes of interdiction are unnecessarily long and result in huge amounts of money being paid to teachers for no return. Disciplinary procedures involve a wide use of discretion and funds used for the payment of witnesses are abused. The payment of salaries is carried out at the discretion of junior members of staff. There is no clearly defined system in use, which results in many cases of non-payment, over payment and duplication of payment. There is no reconciliation of cash payments and unpaid monies are often diverted for other use when they should be reimbursed to government. Long delays in the whole system of payment are conducive to the performance of corrupt acts by staff.

4.6.6 Kisumu Municipal Council

A brief "Risk Assessment" of the operation of the Council found that overtime payments were excessive; water revenue collection was being abused; no external audit had been carried out for over four years. Outstanding imprest payments exceeded 20 million Ksh. The Council issues IOUs to suppliers and staff because it cannot meet its financial obligations. The whole system of procurement, used by the Council, is flawed and abused. There is no effective administration of contracts and contracts are let without funds being budgeted for. The income from the sharing of facilities at Health Centres is misappropriated and in general the Management Practices used by the Council are extremely poor.

4.6.7 South Nyanza Sugar Company Limited

This Risk Assessment Report attempts to ascertain why payments of accounts and salaries are delayed and also check on reports that some managerial staff are engaged in unethical practices. This study was undertaken at the request of the General Manager of the company.

There were some observations made which were relevant to commercial decisions and not to a corruption prevention exercise.

Another observation reported "It was apparent that there exists a cartel (involving the police, lawyers and insurance staff) colluding with company employees to defraud the company of money and property and frustrate its programmes and activities". This type of statement is inflammatory and although does not mention specific persons, could be the cause of legal action. Should malpractices be discovered during the course of such a study and there is reason to believe that offences can be substantiated, the case should be reported to the investigative arm of the organisation to deal with and should not be mentioned in a prevention report.

Other findings included: conflicts of interest, nepotism, irregular award of contract, payment to “ghost workers”, poor legal support and misappropriation of funds. Recommendations were made to deal with these deficiencies.

4.6.8 Kenya Veterinary Vaccines Production

This study, carried out in June and July 2001, was in response to a number of complaints from farmers and other members of the public. Complaints centred on malpractices in procurement; abuse of financial procedures and irregularities in the marketing of vaccines.

The report commenced its findings with a vitriolic attack on the previous Board of Directors and made many very strong statements about the former Managing Director, alleging incompetence, abuse of office and other deficiencies. The statements were not substantiated and many of them alleged criminal activities. No recommendations were made to take remedial or corrective action in respect of the “issues” identified. However, recommendations were made to the current Board and Managing Director. These comments were based on their predecessors’ performance and could be construed as insulting to the incoming post-holders. An appraisal was carried out on key members of staff. Recommendations were made to remove/transfer/replace some staff. These matters were outside of the remit of corruption prevention assignments and should not have been reviewed. Stores procedures were reviewed and some good recommendations made. The most significant area of the study related to the inspection of financial procedures. These were found to be inadequate and, as a result, several anomalies were found. Other subjects included auditing, budget control, cash handling, imprest management, overtime working, marketing, computer systems, record management of physical assets, engineering department, production department, quality assurance department and research and development department.

The fact-finding aspect of the assignment was carried out in nine working days. It is our considered opinion that it is not possible for this study to be carried out properly in such a short time. Superficial findings based on insubstantial allegations are fraught with danger and, if disproved, could be very detrimental to the credibility of all future work done by the department.

4.6.9 Pensions Department

This study was conducted in response to many complaints with regard to the processing and payment of pensions. The Pensions Department is responsible for the payment of pensions to all retired public officers.

Interviews were held with public officers of all ranks who are involved in the payment of pensions. KACA staff also posed as pensioners to elicit opinions from real pensioners.

Reported findings included the fact that the Pensions Department has no written guidelines for the payment process. In the absence of a checklist of documentation required and the use of ad hoc procedures to deal with claims, it was established that the system had been abused and documents used twice to duplicate claims and also to create files for "ghost pensioners". Recommendations were made to prevent further abuses of the system and improve supervision at all stages of process. An examination of the physical process of payment to pensioners by district offices revealed that widespread abuse of pensioners' money was taking place. In one district a sum of nearly 390,000 KSh from the pensioners fund had been used for other purposes. This meant that pensioners wanting to draw their pensions might not have been accommodated. Once the physical processes for claims have been completed all relevant documents require storage. This is not being done and documents are removed for illicit purposes.

4.6.10 Other Work

In addition to the above assignments, other studies were commenced just prior to, or during the course of, our visit.

4.6.11 The Operation of the Traffic Police Department

This assignment was undertaken on the initiative of the Head of the Preventive Services Unit.

As stated previously, the timing of assignments is determined by the availability of staff and the approval of the Director is obtained before detailed preparations are made. In the case of this assignment, initial approval was sought on or about the day we commenced our visit, on 14th January 2002, although it was stated that this assignment was scheduled and had nothing to do with our presence.

An official notice was sent to the Head of Traffic Police advising him of the assignment. Normally, the Director signs this advice but, in this instance, due to rank structure, the Head of CID signed it.

With input from the Traffic Police, a work plan was devised and a budget calculated. This work plan contained the terms of reference, scope and details of the methodology to be used.

All members of the Corruption Prevention team were briefed and the Head of the Traffic Police sent an official notification of commencement of the assignment.

The Head of Prevention Services decided to notify the press of the assignment and invited them to attend the start. The Public Relations Officer made the necessary contacts. The reason given for this move was, "We have to remind the public that we are here". It was also said that the Director is keen on this sort of publicity. As a result of the press being in attendance at the launch of the assignment, considerable coverage was given in the newspapers the following day. This gave the impression that the police traffic units are totally corrupt and that an intense investigation was being launched. It also gave warning to any wrongdoers that they needed to be careful for the duration of the study. This is not the way an

assignment should be carried out. Corruption prevention studies should be conducted with the objective of being constructive and helpful. Clients will be deterred from approaching the Corruption Prevention Unit asking for assistance if this type of activity is to continue. In the event that there are grounds to suspect that corruption is taking place, then an investigation should be carried out to ascertain the facts and, if allegations are substantiated, prosecutions must follow.

The study was carried out by a team from the Preventive Section who visited different parts of the country checking on police activities at checkpoints and other venues. At times, staff covertly posed as passengers on public service vehicles.

The results of the assignment are not yet available.

4.6.12 Border Control Points

The Head of Preventive Services also initiated an exercise to test the integrity of Border Control Points. Using an official, but unmarked, car the team deliberately set out to cross the border into Tanzania without the required documentation. When questioned by border control officials, the team admitted that they did not have the proper documentation but using their "powers of persuasion" managed to get through. After a short stop in Tanzania the team returned through the same border control and this time revealed their identities. The effect of this was to terrorise the officials who had allowed them through the border.

Any attempt by ACPU staff to persuade other public officers to act unethically or to commit offences run entirely contrary to the position that the ACPU should be taking.

4.6.13 Award of Contracts

It has been widely reported in the media that four procurement contracts awarded by the Ministry of Health have been cancelled due to ACPU involvement. As this situation has not resulted in an investigation and prosecution of the officials involved, it clearly indicates that the cancellation was due to some administrative irregularity. This is the type of situation that the ACPU Preventive Services Unit is mandated to prevent. Had the Unit been proactive in its action and overseen the contract award process, this situation would have been avoided and the reputation of the ACPU enhanced. As it is, the resulting action will, in our view, cause resentment and undermine the credibility of the Unit. Future contact with Ministry officials involved is likely to be untenable.

4.6.14 General Comments on Reports

Corruption Risk Assessment Reports have limited use. Due to the very short time taken to conduct these assignments (two to three days) they are of necessity undetailed. They cover some major areas of concern but the review is superficial. Although some input could be said to be “better than nothing” this could lead to complacency in areas not covered. Also if reports are found to be flawed then the Unit’s credibility is undermined.

Many statements are made in the reports reviewed alleging many forms of misconduct and some illegal practices. However, the accusations are not supported with reported factual evidence. All of the reports reviewed have identified gross abuse of the systems under review but in no instance has any referral been made to the investigation arm of the ACPU for follow up. This may give the impression that ACPU condones such practices. It must be an automatic procedure adopted by the prevention services that the discovery of malpractice is immediately referred for full investigation.

The issuance of reports to anyone other than the client, without their permission, should cease forthwith. This is a severe breach of confidentiality. It also indicates a lack of confidence, by the ACPU, in it being able to negotiate and secure changes to deal with identified corruption opportunities. This action also acts as a deterrent to potential clients from seeking assistance from the ACPU knowing that if they do so then any deficiencies purportedly identified will be publicised.

4.6.15 Summary

The proper use of Corruption Prevention assignments is an established part of the effective fight against corruption. It is essential that the methodology used is carefully planned and that all reported facts can be substantiated by evidence. The Corruption Prevention unit is an integral part of the ACPU, but the Unit’s staff must recognise the boundaries of their responsibilities and not overlap into the investigation field. The current staff of the Corruption Prevention Department are keen to do well and they are suitably qualified for the job but they lack experience and professional guidance, which is necessary if the unit is to be effective. It is appreciated that, when setting up the organisation, every effort was made to appoint the most appropriate staff, but when introducing an entirely new concept it is essential that the leadership be suitably experienced and qualified to motivate and train staff and direct strategy.

We would also comment that there was no apparent over acting strategy that was being executed by the Preventive Services Unit.

4.7 A DRAFT PROPOSAL FOR FORMATION OF CORRUPTION PREVENTION COMMITTEES

This draft paper, produced in January 2002, seeks to institute Corruption Prevention Committees in all Ministries, Provinces and Districts. The terms of reference include creating public awareness, promoting integrity and coordinating Corruption Prevention efforts in their areas of jurisdiction. It also requires the Committees to “uncover corrupt practices and advise ACPU of corrupt activities in their area”.

The constituents of these Committees comprise Permanent Secretaries, Provincial and District Commissioners and prominent members of public and private organisations. Apart from the Corruption Prevention functions of devising codes of ethics and promoting Corruption Prevention recommended procedures, there is a suggestion that each Committee set up an organisation for receiving reports of corruption.

The functions specified are a direct responsibility of Corruption Prevention Department and the suggestion that individuals outside the ACPU should receive corruption reports is fraught with danger. In fact it creates one of the most significant corruption opportunities possible. The more hands that a report passes through the greater opportunity there is to “lose” the report or for the information contained in the report to be used for elicited purposes. The ACPU is required by law to receive reports of suspected corruption and it should provide the mechanism to do so directly.

There is also a proposal that District Committees should provide 2 staff on 10 hour shifts to man the hotline. This should not be proceeded with for the reasons stated above. The ACPU urgently needs to provide facilities for countrywide reporting of corruption, to enable informants to communicate directly with the unit, at the same time maintaining total confidentiality.

4.8 THE PUBLIC EDUCATION GROUP

4.8.1 *Statutory Duties*

The legal requirements of the Public Education Group are:

“To educate the public on the dangers of corruption and to enlist and foster public support in combating corruption.”

4.8.2 *Work of the Public Education Group – The Policy*

The Public Education Group should be mandated to educate the government, the private sector and the general public on the evils of corruption and to enlist their support in the fight against it. The Group should organise seminars and meetings to do this. The effects of corruption on the National economy and on the livelihood of individual citizens can be explained. All persons are advised of their duties and responsibilities under the law and ways in which corrupt practices may be reported to the Authority. In conjunction with the Ministry of Education regular anti corruption talks should be included in school curricula.

Private and public sector organisations are advised on devising codes of ethics and codes of conduct.

The work of the Anti Corruption Agency is publicised through media campaigns, during which the assistance in fighting corruption is sought from the general public.

Participation in Exhibitions, Trade Fairs and other public gatherings will facilitate the enhancement of public relations with the citizens of Kenya.

All aspects of ethical behaviour are to be encouraged from all departments of public and private sector organisations.

4.8.3 *Present Activities of the ACPU Research and Education Department – The Plan*

The Research and Education Department has a staff of 10. One of their initial tasks was to devise and conduct a survey to obtain the level of awareness of the public in relation to corruption and the work of the KACA (now the ACPU). An analysis of findings was made and a report issued.

There are currently six Education programmes running in different organisations. ACPU staff are of the opinion that the country is too big for a comprehensive infrastructure. The Department proposes to hold a national symposium of stakeholders to launch a plan for the setting up of steering committees in each organisation and the steering committee would be responsible for identifying its own problems and facilitating a Corruption Prevention programme. The ACPU would remain a reference point and be available for consultation. It is planned to divest the responsibility of the ACPU to other organisations. The Director of Personnel Management will be consulted in the setting up of this programme, which is expected to be launched on 20th March 2002. The title of the programme will be “Restoring Integrity in the Public Sector”. Training courses are being

planned to give to facilitators, from various Ministries, to assist in passing the anti corruption message to as many civil servants as possible and to encourage individual organisations to devise their own Corruption Prevention measures. Currently 24 facilitators, in three teams, have been trained and Ministries will identify further personnel until over 960 staff are trained. Each person will be given specific areas of responsibility. The ACPU will set up liaison officers for each Ministry and they will assist in setting up specific guidelines for each Ministry. Client organisations will be encouraged to set up their own Corruption Prevention committees and conduct workshops and seminars. Each programme must be designed to be sustainable and easy to implement.

It is proposed to set up a committee of stakeholders for schools and the committee will introduce modules, to be inserted into the school curriculum, to introduce ethical and moral values to the students. The committee would also be encouraged to evaluate and remove harmful material from teaching. Schools will be encouraged to set up anti corruption debates.

The ACPU will create active liaison with schools and initiate competitions for which prizes will be provided. There will be poem, and song competitions. Drama presentations, with scripts written on anti corruption themes, will be produced. The ACPU will assist with these.

Other activities involving the ACPU staff include private sector programmes for fighting corruption and formulating a code of ethics for use by them. The themes to be adopted are "It is time to do something" and "Forget the past -- start now".

It is planned to develop an Ethics Centre this year. It is hoped that this can be done in partnership with other organisations that will contribute financially toward the running costs. A policy needs to be promulgated regarding the acceptance of "donations" by the ACPU.

Workshops will be set up and panels convened to resolve concerns and conflicts with codes of ethics. Local custom dictates that the acceptance of gifts is in order and the ACPU is having problems in this respect as there is no clear definition of "a gift". Conflict of Interest is another area of concern

The running of private businesses by public officers presents a problem, as only senior public officers are required to report details of their businesses and make declarations of interest. As a result many minor staff are placed in positions where they are able to influence decisions in favour of their private interests. The attitude of government to allow public officers to have private businesses is detrimental to their performance of duties. It is only natural that staff will indulge in their private affairs during official time at the expense of their public duties. This is in itself an offence.

There is an active programme to involve the general public in the fight against corruption. Private sector employers are encouraged to implement their own corruption prevention measures.

4.8.4 *Conclusions*

Whilst it is appreciated that Kenya is a large country and the Research and Education Department is small, the concept of divesting itself of its responsibilities is not reflective of the strategy successfully deployed in other countries.

We believe that this is another example of defective strategy based on lack of experience. This point is illustrated by the fact that the unit is very selective about the types of meetings they attend and the groups of people they talk to. It should be recognised that the image of the ACPU is reflected by the way in which its public relations campaign is conducted. Although there is merit in giving general training to members of other organisations, the role of the unit is to communicate first hand with all sectors of society. Staff of other organisations cannot be expected to know the full extent of the law and the activities of the ACPU. In the interests of accountability and transparency it is necessary for staff of the ACPU to meet the public face to face.

The cooperation of the Director of Personnel Management, in introducing ethical standards into the public service, is commendable. However it is incumbent upon the ACPU to take the lead in this and provide civil servants with guidelines on the law and the standards of ethical behaviour required.

The present planned programme of activities would appear at first sight to be quite comprehensive but one very significant factor has not been given due cognisance. The act of corruption involves two parties and although educating the public sector employees and even private sector employees is an essential part of the programme one must not neglect the general public. It is the behaviour of the ordinary citizen that will determine the success or failure of an anti corruption campaign. Therefore it is essential to get the backing and active support of all citizens. This can best be achieved through intensive media campaigns (the Minister for Tourism and Information has confirmed his support) and open meetings where members of the public can air their concerns and obtain first hand information. There needs to be proactive education in all schools and other educational establishments. The subject of ethical behaviour can be addressed with the aid of civic leaders. The Council of Churches and principal Church leaders have pledged their support in this.

All of these proposals require ACPU staff to have a detailed knowledge of the law and the activities of the ACPU. They will also need to be professional in the way that these facts are disseminated to the public. This will require a high level of internal training.

4.9 REVIEW OF CORRUPTION CONTROL BILL 2002 – DRAFT LEGISLATION AND STRATEGIC PLANS

As required, we have carried out a review of the following legislative drafts and have a number of detailed comments which are set out below.:

- 1) The Anti Corruption and Economic Crimes Bill 2000
- 2) The Anti Corruption and Economic Crimes Bill 2001
- 3) The Corruption Control Bill 2002

In general terms any new Bill, if it is to be effective, must establish investigative and operational independence in the new anti corruption authority. We understand that the Attorney General supports this view and appropriate redrafting will take place to ensure this is the case.

4.9.1 Part 1 – Preliminary

We recommend consideration be given to a number of additions to this part of the Act.

i) Deputy Director

A Deputy Director's post should be included. A number of executive powers are invested in the Director. There must therefore be a nominated individual to execute those powers in the event of the Director's demise, incapacity or his absence through leave or an authority commitment.

Also, as the Authority will be undertaking field operations it is essential that a well defined and understood chain of command be established.

ii) Staff Monitoring and Dismissal

An essential function of the authority will be the monitoring of its own staff conduct to ensure that the highest standards of integrity and conduct are maintained. The work is detailed, time consuming and onerous and would overburden the Director. In any event, there is a need for the Director to distance himself from monitoring staff so that he can take a dispassionate view of results produced to him. He should, in fact, be the final arbitrator of cases where it is proposed to remove an officer from the Authority Investigation of corruption and complex economic crime, prevention and education requires close, detailed and experienced supervision from the highest ranks within the organisation. There is a need to co-ordinate the employment of resources so that effort is directed to the most important and pressing tasks. Thus, a need arises to arbitrate between the competing claims which would be made by Assistant Directors. The volume of such work which will be required will be far too much for the Director to undertake alone given his other important commitments. There is also a need for very high ranking control over the use of covert investigation techniques. Again this is detailed work from which there is need to relieve the Director.

iii) Clause 2

Interpretation – clause 2 under public body include “or any company in which 51% or more of the equity shares are owned by the Government of Kenya”.

4.9.2 Part II – Kenya Corruption Control Authority and Board

i) A – Kenya Corruption Control Authority

Functions of Authority – Section 4. The operational functions of the Authority must be succinctly stated under this Section, not referred to another Section within the Bill for definition. We would replace this Section with those powers specified in Section 6 of the Botswana Corruption and Economic Crime Act 1994:

This Section reads that the functions of the Directorate shall be:

- a) to receive and investigate any complaints alleging corruption in any public body;
- b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
- c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;
- d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
- e) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;
- f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Director, may be conducive to corrupt practices;
- g) to instruct, advise and assist any person, on the latter’s request, on ways in which corrupt practices may be eliminated by such person;
- h) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;
- i) to educate the public against the evils of corruption: and
- j) to enlist and foster public support in combating corruption.

Independent Authority – Section 4A(2)

The Independent Authority, because of importance and extensive powers, must be accountable to a specially appointed Select Committee to Parliament. This is dealt with in the 2000 Bill but not the Corruption Control Bill 2002. It is a serious defect which should be remedied before the Independent Commission is created.

ii) Appointment of the Director – Section 6

This should simply state “The President shall appoint a Director on such terms and conditions as he thinks fit.” The remaining Directorate appointments should be on the recommendation of the Director via the Cabinet Secretary to the President.

iii) Restrictions on Activities of the Director – Section 8

These restrictions must apply to all officers and members of the Authority staff. After the Director add “Deputy Director, Assistant Directors and each officer and member of the Authority staff shall not...”

iv) Authority Staff – Section 11

The Authority may work in co-operation with all bodies and persons. There is no need to define who it may work with.

v) Disciplinary Code – Section 12

It is self-evident that the staff of such an Authority will have to have high standards of integrity. The Director should make all appointments and be able to dismiss when he has lost confidence in the integrity of a member of staff. We would therefore recommend that this includes the following powers in the Bill:

“The Director should be responsible for the discipline of his staff, and may, if he is satisfied that it is in the interests of the Authority, terminate the appointment of an officer without assigning any reason therefore.”

vi) Annual Report – Section 15

The Minister to whom the Annual Report should be submitted ought to be stated clearly in the Bill.

vii) Financial Arraignments – Section 13

If donors are involved we would suggest a Special Fund (supervised by an independent accountant) being set up for sole use by the Authority.

4.9.3: Part II

i) B – Kenya Corruption Control Board

Establishment of Board, etc. – Sections 16 to 20 I

In our opinion the drafting of the responsibilities of the Kenya Corruption Control Board is extremely bureaucratic and unwieldy. In principle, we are in favour of responsible and honest members of the public having an advisory role into the strategy and operations of the Authority but not in such an all encompassing form. Our recommendation is that the board should be divided into smaller committees to advise the three branches (Investigation, Prevention and Education) and meet 4 times a year, the number of meetings per committee per year could be flexible. And that the full Board meets once at the end of each year to be briefed on the work of the Authority by the Directorate officers.

In respect of Allowances – Section 20 H this should not be the subject of discussion. Involvement with the Authority should be voluntary. To eradicate corruption is in the wider public interest and individuals of the integrity and status required should give of their time freely and voluntarily. To be paid expenses does not reflect the expected level of commitment.

Finally in respect to this part the title should read KACA and Economic Crime Advisory Board. The word Control is incorrect. The role of these respected citizens is to Advise.

4.9.4 Part III – Investigations

i) Authority to Investigate – Section 20 J

This section requires redrafting. It would not be understood by members of the general public. At (b) it states any matter referred to it by the National Assembly. This is too wide, any matter could be a murder investigation.

ii) Investigators – Section 21

Take out “an Assistant Director”. Only the Director to authorise an investigation. If a person is “acting up” he is the Director.

iii) General Powers of Investigation – Section 23

As a point of principal and philosophical approach the new Independent Unit must be seen as such. Its powers must be its own and expressly identified in the statute. Incorporation of powers by reference to the police – whilst understandable from an ease of drafting perspective – does not achieve this objective. This is of particular concern given the general impression of the police within Kenya.

Throughout the body of this report we have recommended that the new anti corruption unit be in independent.

In addition to normal operational independence we believe and recommend that the unit have significantly enhanced powers.

In particular it should be expressly permitted to have:

- a) authority to cause the production of records and to retain same;
- b) authority to cause a person to provide explanation or information;
- c) authority to order surrender of travel documents;
- d) authority to inspect bank accounts and search bank deposit boxes;
- e) authority to freeze assets;
- f) authority to search premises and seize property;
- g) authority to arrest, charge and detain suspects.

This level of power was determined to be necessary and appropriate in both Hong Kong and Botswana.

It is our view that the case for such powers is much stronger in Kenya because of the nature and level of concern about the integrity of the judiciary.

Protection for the public from abuse of powers by the authority should come from:

- a) its advisory board;
- b) the independent prosecution unit;
- c) the new special courts;
- d) judicial review proceedings, and;
- e) the parliamentary oversight select committee.

All these powers must be fully defined so that the public understands them and the justification for their use. In addition to the above, provision must be made which will facilitate confidentiality of investigations with respect to the suspect. The authority must have powers in relation to bail and charging without recourse to the courts or the use of police facilities. They must also be able to release a suspect on bail conditions, again to be granted within the authority of the Director of the Authority. It is also essential that the charging process takes place on Authority premises, not at the police station because the Kenyan police are perceived to be tainted. The Authority must be seen to be totally independent.

iv) Related Offences

It is important for the effective investigation of corruption that the powers of investigation should apply to the investigation of offences which are reasonably suspected to be connected to a corruption offence. A provision must be included enabling the Authority to investigate offences reasonably suspected of arising out of, or of being related to, a corruption offence.

The Act must also include sections penalising “resisting arrest and assaults on investigators”.

v) Identification for investigators – Section 24

Identification documentation of Authority staff must be signed by the Director.

vi) Disclosure that may affect investigation – Section 28 (1)

This Section is too weak. Include “or any detail of such an investigation” Delete last part “if person believes or has reason to believe, etc.” This provides avenues for defence which are neither necessary nor appropriate.

vii) Section 28 (2)

Delete entirely. You may have to arrest a person very early into an investigation, i.e. he is about to flee the country, or he is witnessed destroying evidence.

4.9.5 Part IV – Corruption Offences

Meaning of Agent and Principal – Section 38 (1)

Under Principal after person include “whether in the public or private sector”.

i) Protection of Public Property and Revenue – Section 42 (C) (2).

The wording of this Section is very wide – it may include a cheque. If so, the volume of complaints in respect of this offence alone would outstrip the agency’s resources.

Generally we are not confident that all offences are covered. This part of the Act requires a level of study which is not achievable by 22nd February 2002.

For example, consideration should be given to the issue of “Accepting an Advantage”. Public servants ought not to be soliciting or accepting gifts. No public servant should ask for, or accept, any advantage unless given permission to do so. It may be appropriate to include a provision that reads “Any public servant who, without the general or special permission of the President, solicits or accepts any advantage shall be guilty of an offence.” The point of such an offence is that it does not require proof of inducement or reward. Presidential permission could be given generally to public servants by notice specifying categories of gifts they

could accept. Anything else would require specific permission. The power to “permit” could be delegated.

4.9.6 Part V – Compensation and Recovery of Improper Benefits

i) Order Preserving Suspect Property – Section 48

This order should be made on the authority of the Director, particularly if required to be enforced prior to commencement of court proceedings.

ii) Additional Views

Further powers that should be considered within the investigative process include the power to intercept private communications – see Section 25(1) of the 2000 draft Bill. We do not agree that the product of such a medium should be used in evidence for legal and evidential reasons. However, it is an extraordinarily useful intelligence tool and should be available as a technique.

Consideration should also be given to including the offences of corruption that occur during an electoral process. Legislation to cover this aspect of corruption within society is included within the powers of the ICAC in Hong Kong.

iii) Amnesty Provision

If an amnesty for past conduct is to be given it would have to be included within the legislation. See Section 63 of 2001 Bill.

iv) Jurisdiction

Liability for offences should be included for offences committed abroad, i.e. at an Embassy or High Commission premises. Include “where an offence is committed by a citizen of Kenya in any place outside Kenya, he may be dealt with in respect of such an offence as if it had been committed within Kenya.”

v) Conclusion

This legislation is vital in the fight against corruption and economic crime within Kenya. We repeat our recommendation that it requires redrafting and strengthening. This would be best achieved by an experienced prosecutor and an experienced investigator, assisted by a competent law draftsman, sitting together, with an awareness of the level of the challenge faced by Kenya today.

4.10 REVIEW OF REVISED DRAFT PUBLIC SERVICE (CODE OF CONDUCT & ETHICS) BILL, 2001

This revised Bill seeks to establish a Public Service Code of Conduct and Ethics Committee. It defines Prohibited Conduct and sets out procedures for dealing with complaints. This revision has taken into consideration the comments made on the first draft regarding the separation of powers. As a result the Judiciary and Legislature will remain the subject of existing controls and this Bill now only refers to public officers.

It is our general view that this piece of draft legislation is materially over engineered and over complex in some areas and defective in others. It also confuses normal performance of duties with more fundamental issues of ethics.

We are concerned as to the general structure and complexity of this Bill. Furthermore we question where a proper analysis of the resource requirements has been made to give effect to it.

Our detailed comments are as follows:

4.10.1 Part I

Clause 2 -- A definition of benefit is again attempted. It would be clearer if it simply stated that "benefit" as defined in the Control of Corruption Act.

KACA -- this definition has been revised to reflect that the new KACA is being established under an amendment to section 26A of the Constitution. This is now not the case and will require amendment throughout the Bill.

4.10.2 Part II

Clause 3(1) - Relates to qualification to be a member of the Public Service Code of Conduct and Ethics Committee. Persons excluded from appointment are those with convictions for corruption or corruption related offences. It is usual for disqualification to include any person found guilty of an indictable offence.

4.10.3 Part III

Clause 5(1)(c) - Provides that a public officer who resigns within ninety days of the implementation date he/she will not be required to make a declaration of assets. Provision should be made for "If there is good reason to believe that the officer resigned purely to avoid making a declaration the matter would be referred to KACA for further investigation".

Clause 6 -- We question whether this is practicable and would ask whether any research as been done to identify disclosure mechanisms through IT systems.

Clause 15 (1)(c) - Still allows for public officers to engage in private business during working time. This should be prohibited.

Clause 16(1)(c) - Does not suffice in this regard.

4.10.4 Part V

We have some difficulty in understanding a number of features of this part of the Act.

Specifically, it is unclear what criteria the Committee should use under S21(i) to determine who should deal with the complaint.

This may present a series of legal challenges depending on which body is selected. There are also substantial potential difficulties in relation to “double jeopardy”.

Clause 9(b) – We question why this is not a criminal offence.

Clause 10 – We make the same observations here as we make in respect of the advisory board of the KACA.

Clause 20(1) - Provides for the Committee to make enquiries or refer to KACA for investigation. Clause 20(2) requires KACA to report back to the Committee its findings. This clause should reflect that matters referred to KACA would not be reported back to the Committee, until the legal process has been finalised, should corruption be substantiated and prosecution instituted.

Clause 20(2)(a) – Contains a double negative and a three stage test. The entire subsection is badly drafted.

Clause 21(2) – Presents difficulties in relation to confidentiality given the mandatory requirement to report back to the Committee.

Clause 22(1) – Could conflict with criminal or civil process.

Clause 22(2) – Is again mandatory and produces serious issues in respect of confidentiality.

Clause 22(3) - Requires the Committee to refer findings to the Attorney General if they are of the opinion that a criminal act has taken place. Caution needs to be taken to ensure that a situation of placing someone in “double jeopardy” does not arise.

Clause 23 – Raises additional double jeopardy issues.

Clause 26 – Requires the Committee to apply rules of natural justice. This could mean notification of and a right to legal representation in respect of material allegations. Again, this raises the issue of confidentiality. It also raises questions about timely and effective disposal of cases. Conversely, there is no express application of the rules of natural justice when the Committee refers matters for investigation. This is inconsistent and clearly the subject of possible legal challenge.

Clause 28 – We would question whether a penal sanction over and above financial should be available if the Committee finds that a complaint was either malicious, frivolous or vexatious. We also question the additional express requirement that it be made in “bad faith”. This is implicit in the first three criteria.

Clause 30(2) – Should expressly indicate what standard of proof is appropriate in these circumstances.

Clause 32 – Raises issues of conflict of process if, for example, KACA investigates on the request of the Committee and produces its findings which result in the Committee taking an act which is appealed whilst, at the same time, the KACA initiates criminal proceedings through the Attorney General’s Office.

Clause 32(e) – We question whether this is appropriate given the Committee may refer cases to the KACA.

Clause 33(2)(b) – The meaning of this subsection is unclear as is the rationale for the purported exclusion of judicial review.

Clause 36 – This Section presents probable major procedural problems. It is arguable, for example, that where an employee can be dismissed for dishonesty under his Civil Servant’s employment contract or general terms and conditions of work investigation by the Committee or referral to the KACA is prohibited.

4.10.5 First Schedule

Part A enumerates all officers to whom this legislation applies.

4.10.6 Second Schedule

This form to be used to declare assets is far too detailed. The personal particulars required are much more than are needed to confirm a person’s status. It is possible that the requirements of this form could be seen as an infringement of civil liberties and challenged in a court of law. A simple statement of principal assets (land, property, etc.) and a declaration of business interests should suffice.

4.11 REVIEW OF PUBLIC SECTOR INTEGRITY PROGRAMME

The Anti Corruption Agency has produced a "Sourcebook for Corruption Prevention in the Kenyan Public Sector". The Director of Personnel Management and the Permanent Secretary to the Cabinet and Head of the Public Service have endorsed the issue of this booklet.

The booklet is divided into eight modules:

1. The Concept of Corruption
2. Risk Assessment and Management
3. Corruption Prevention Plan Development
4. Organisational Culture and Ethical Behaviour
5. Code of Conduct Development and Implementation
6. Personnel Management
7. Financial Management and Materials Management
8. Project Planning and Management

As stated in the introduction this a guidebook to be used by Ministry personnel in their individual tasks in the prevention of corruption.

The booklet is quite comprehensive but lacks specificity in many important areas. It is a theoretical textbook on Management. The language used is verbose and the text is full of technical management language and "buzzwords". To the initiated, this could well be a useful book, complete with checklists, to use, etc. To the uninitiated it will mean very little. In order to derive full benefit from this booklet, users will need to have had considerable training in management subjects.

The whole concept behind the issue of this booklet is based on the assumption that designated Ministry/Departmental staff will undertake the Corruption Prevention function in individual Ministries/Departments.

This point is made elsewhere in this report that, in the interests of maximum effectiveness, the responsibility for Corruption Prevention training should rest with the ACPU. Only if staff are able to keep up to date and have a first hand knowledge of Corruption Prevention, as opposed to pure management, will material improvements be made. Should Government feel that there is a need for more staff undertaking Corruption Prevention activities then instead of designating existing Ministry staff to deal with this then they should provide a similar number of staff and resources to the ACPU to perform this function. The ultimate responsibility for carrying out the Corruption Prevention function must always rest with the ACPU.

Our specific comments on some of the various modules of the document are as follows:

- a) 2.5.5 – In relation to licensing procedures the booklet states. “In order to minimise risks in any of the above, the organisation required an effective code of conduct or policy to guide its employees”. This gives the impression that the only safeguard needed to protect the system is that of having a code of conduct to follow. A code is only one part of the prevention programme. An experienced Corruption Prevention Officer would be able to suggest many ways in which procedural changes can be made to improve integrity;
- b) 2.6.6/7 – These clauses relate to the handling of sponsorship. It cannot be overemphasised that any government organisation that either solicit or accepts individual sponsorship, leads itself open to solicitations from unscrupulous sponsors. Should it be determined that sponsorship is to be allowed then all donations should be received at a central government source and reallocated as necessary;
- c) 2.5.8 - Regarding the use of equipment and resources it is acknowledged that this involves a high corruption risk. Organisations are advised to put their own safeguards into place. It is considered that allowing individuals to monitor their own behaviour only works when honest people are involved. In this instance it would be advisable for the ACPU to devise safeguards and to monitor their implementation;
- d) 2.5.9 – Unwritten or Ambiguous policies are certainly a weak area. More specific guidelines are needed in this respect;
- e) 3.5 – The suggestion that each Ministry and Department should devise their own corruption prevention plan, is flawed. There must be a national corruption prevention programme that is applied across the board within all organisations and to the same degree. Standards must be set and maintained and this will only be done if the ACPU devises the plan and oversees its implementation;
- f) 3.8.2.3 – The suggestion that an organisation should assign the work of implementing and coordinating corruption prevention programmes, is unclear. It is not stated whether this person will be assigned the role of “Integrity Assurance Officer” in addition to his/her normal duties or whether special posts will be created. If the post is part time then it is envisaged that corruption prevention work will be of lower priority than what is perceived to be more productive functions. There is a suggestion that this person will also review reports of corruption and take administrative action. It is again emphasised that the functions must remain the sole prerogative of the investigation arm of the ACPU and also that corruption offences must never be dealt with administratively. It is also unclear how this person will assure that all staff are trained in corruption prevention duties if this person is not a member of staff of the ACPU;

- g) 4.12 – The checklist for analysing and managing organisation and cultural behaviour mentions “objectives” key messages” and “strategies” but there is no mention of what these are or where this information can be obtained. This module is very relevant in corruption prevention work but can only be dealt with by qualified staff that have received specific training;
- h) 5.1 – The introduction of codes of ethics/conduct is only the start of a corruption prevention campaign. The difficult part is putting it across to staff and then implementing it. Once again this will require much training and needs experienced staff to it carry out;
- i) 5.5 – This refers to standards of expected behaviour but there are no indications as to what these standards are;
- j) 5.6.4 – The sample code of conduct is not a good example. The example is merely a set of ground rules for a workshop and does not refer to ethical considerations.

4.11.1 Conclusion

This booklet has obviously been carefully prepared and its objectives are laudable. However, it should only be seen as a guidebook to the professionally trained officer and not as a general guide for the untrained or inexperienced.

4.12 REVIEW OF THE DRAFT NATIONAL ANTI-CORRUPTION PLAN

As is evident from our earlier remarks, it is our opinion that the Draft National Anti-Corruption Plan is flawed because it does not, in our respectful view, address the fundamental issues.

This is demonstrated throughout the entire document. Furthermore, it over-estimates what can be achieved in short time periods with limited resources. Finally, it fails to prioritise objectives in a logical and coherent manner.

The front cover of the document demonstrates one small, but important, example of this point where an attempt is made to demonstrate the fight schematically. Rather than putting the "Rule of Law" as the bedrock of future improvements it is placed in the top right hand quadrant. This is both philosophically and operationally wrong.

In failing to identify the critical issues and failing to prioritise them, the plan demonstrates one of our major propositions, namely, that there is a lack of experience within Kenya in dealing with corruption on an operational level and at a judicial level.

This is a highly unfortunate situation because the plan is and has been used to brief the public and interested third parties, such as the multilaterals, donor states and the multinationals.

Once Kenya fails to deliver on the plan, as in our view it inevitably will, Kenya will be accused of being uncommitted to the fight against corruption and a series of political and economic consequences will inevitably ensue.

Again, as detailed elsewhere, we recommend that the plan be reviewed with the assistance of experienced experts, with a view to generating a new, properly budgeted plan with realistic time-lines and objectives that can be shared with the Kenyan people.

We have exactly the same comments in respect of the Draft Strategic Plan of the ACPU.

4.13 TAX

One of the critical issues facing Kenya, along with many other countries, is its ability to collect revenue.

In its simplest terms, there are significant shortfalls of collection in all areas of collection. This has a direct impact on the amount available for the Kenya Government to spend to support the country's infrastructure. The Kombo Committee Report reputed that Kenya lost 130bn KSh in tax evasion in 1999.

During the course of our visit we met and exchanged views with a number of Commissioners of Revenue as well as the Head of the Kenya Revenue Authority.

Whilst, as in other areas, it was apparent that some progress was being made in addressing revenue collection, it was equally apparent that corruption was having a material adverse impact in this area as well.

Corruption was an issue, not only because of illicit relationships being formed between the revenue authorities and the public, but it was also clearly an issue when cases got to court.

We were told that the various revenue authorities had a less than 5% success rate when they took tax payers to court in either civil or criminal process.

This is a staggeringly low statistic. A number of the Commissioners to whom we spoke expressly stated that they had given instructions to their staff to settle rather than risk losing court cases.

This has a clear potential impact before the issue of corruption rears its head. Specifically, if taxpayers know that the revenue authorities are litigation risk adverse they will clearly push avoidance mechanisms to extreme levels, knowing that, if they are caught, the Kenya Revenue Authority will not fight.

We were told that the Government is seeking to address this issue by authorising the Kenya Revenue Authority to use external legal advisors to advise it and act in criminal and civil proceedings on its behalf.

This is, in our view, only a partial answer. Whilst it is outside the terms of our mandate we would recommend that the Kenyan Government give consideration to encompassing both civil and criminal revenue adjudication within the remit of the new corruption and economic crimes court.

We make this recommendation because if the courts are established as envisaged, they will possess the necessary expertise to deal with tax issues. The process will be quick and effective and the justice impartial.

We would suggest that, within a short period, this device would result in significant improvement in the nature and extent of disclosure to the revenue authorities and therefore an increased revenue collection.

4.14 IMF/WORLD BANK FUNDING AND THE POSITION OF DONOR STATES

As stated in this report when we were first instructed we were repeatedly accused of being a 'sop' to the multilaterals.

We have also reported that the multilaterals expressed support for the Government initiative but were concerned to see tangible progress.

We were made aware of certain conditionalities that are required to be achieved before funding will be resumed by the IMF and the World Bank.

We have made recommendations in this report in relation to two draft Bills that we believe are necessary and appropriate to enhance Kenya's fight against corruption, the passing of which, we understand, are critical to the resumption of funding.

Both the IMF and World Bank officials expressed openly their individual and institutional lack of experience in assessing both legislation and anti corruption strategies.

It would be entirely wrong in, our respectful submission, to push through, or to pressurise the Kenyan Government to push through, legislation which does not meet the operational or strategic issues we have identified.

We respectfully request that both institutions reconsider their position in relation to appropriate conditionality.

