CSPEN MEMORANDUM ON THE PROPOSED ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 40 OF 2023 | 13TH MARCH 2024

1.0 BACKGROUND AND INTRODUCTION

The Civil Society Parliamentary Engagement Network (CSPEN) is a forum for Non-state Actors, bringing together civil society organizations, professional associations, think tanks and research institutions whose programme areas involve working with the legislature. The network was established in 2019 as a joint initiative of the Westminster Foundation for Democracy and Mzalendo Trust to provide a coordinated engagement with the Kenyan legislature, its committees and members in their oversight, legislation, and representation roles. Broadly, CSPEN seeks to engage with the legislature to ensure that legislative output meets the constitutional requirements of leadership, accountability, and integrity and is reflective of and aligns with the broader public interest. Currently, CSPEN has a Membership of Thirty-Seven National Civil Society Organizations, and the priority areas are guided by the design and architectural framework of the parliamentary committees of the 13th Parliament ranging from, Public Finance Management (PFM) and Devolution; Inclusion and Representation; Leadership and Integrity; Human Rights and Access to Justice; Public Participation & Service Delivery; Climate Justice and Environmental democracy.

Recognizing that Parliament derives its legislative authority from the people, Parliament has put in place measures to comply with the principle of public participation as enlisted under Article 10 of the Constitution of Kenya, 2010. This includes convening public forums, submitting calls for memorandum through print and electronic media, and inviting members of the public, including representatives of civil society organizations to present their views. As a key tenet of entrenching good governance, CSPEN has therefore collectively submit this memorandum on the **Anti-Corruption and Economic Crimes (Amendment) Bill, National Assembly Bills No. 40 of 2023.**

The position as captured below incorporates the views of partner organizations including the African Parliamentarians Network Against Corruption (APNAC-Kenya Chapter); Mzalendo Trust; Development Gateway; Transparency International Kenya; Uraia Trust; National Taxpayers Association (NTA); Collaborative Centre for Gender and Development (**CCGD**); and The Community Advocacy and Awareness (**CRAWN**) Trust.

NB: This memo will be orally submitted by Transparency International Kenya and APNAC Kenya to the JLAC Committee on 14th March 2024.

We hope our proposals will be considered during the deliberations of the Bill.

Sincerely,

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PROPOSED AMENDMENTS TO ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, N.A BILLS NO. 40 OF 2023

Clause	Proposed Amendments / Ramifications	Comments on the Proposed Amendments
2	Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection (2) and substituting therefor the following new subsection- "(2) An officer or person whose functions concern administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for- (i) Substandard or defective goods; (ii) Goods not supplied or not supplied in full; or (iii) Services not rendered or not adequately rendered."	We proffer that the Bill should not be passed, as is, and effected for the reason that the amendments if passed, will afoul several provisions of the Constitution of Kenya 2010 (the Constitution) and legislations, to wit: **i. Violation of National Values and Principles of Good Governance** First, under **Article 10(1) of the Constitution**, national values and principles of good governance bind all state organs, state officers and public officers when such officer "....enacts, applies, or interprets any law" or "... makes or implements public policy decisions". Under **Article 10(2)** some of the cardinal national values include the rule of law, good governance, integrity, transparency and accountability. Read to its proper effect, under section **45(2) of the Anti-Corruption and Economic Crimes Act 2003 (ACECA)** an officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property invariably implements public policy decisions and involves himself or herself in the application and interpretation of the relevant laws and relevant policies. Such an officer is expected to exercise his duties in a manner that has integrity, transparency, in an accountable manner and according to the relevant laws. As such, where a person willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of public property, tendering of contracts, management of funds or incurring of expenditures; or where such a person engages in a project without prior planning, such conduct would, in the first instance, even without more, be a constitutional breach. Even without the prescription provided in section 45(2)(b) and (c) of ACECA, careless conduct of a public officer or willful failure to adhere to the law or relevant policy would negate the integrity, accountability and transparency in that office.

		The principle of accountability requires that a public officer is answerable and must offer explanation and communicate that explanation to persons who are affected by the decisions of the public officer. Whereas the principle of transparency and good governance require a public officer to be open and prompt in his dealings with the citizenry, the principle of accountability also requires that the exercise of public authority conforms to powers vested by law. A failure, neglect, willfulness or carelessness to exercise powers, follow the law or adhere to policy that is proscribed in an Act of Parliament ought not to be considered or viewed as "inordinate and undue criminalization of flaws in public procurement". Public procurement as a way of use, administration or disposal of public resources or property must be subject to constitutional values and principles. **ii. Violation of the Leadership and Integrity Principles** Second, under **Article 73(1) of the Constitution,** a public officer vested with responsibilities has to understand that it is a public trust exercisable in a manner that is consistent with the objects of (national values and principles), demonstrates respect for the people of Kenya, brings dignity to the office, promotes confidence in that office. For this reason, if carelessness or willful non-compliance with the law cannot be proscribed in a legislation as the amendment seeks, the Constitutional provisions on leadership and integrity may be stultified. If engagement in a project without prior planning is permitted in our society, the kind of arbitrariness and capricious expenditure of public resources and disposal of public property would be so wanton that it would bring dishonor to public offices and undermine confidence in those offices. In our view, a law that instills the values required to uphold public trust is a proper law. Further, where carelessness, willful neglect or lack of prior planning becomes part of our public ways of doing business, or at the very least if not prohibited in law, we risk sliding down the culture of lack of objectivity, impartiality and decisions influenced by either nepotism, favoritism or other improper motives. Such conduct would lack accountability, honesty, and would not be in the public interest to remove the culpability prescribed on persons in charge of administrative, custody, management, receipt or use of any part of public revenue or public property. Thus, the deletion of section 2(b) and (c) of ACECA would invigorate a culture of impunity and lack of integrity in public finance management contrary to **Article 73(2).**

		More likely where there is no law that criminalizes lack of planning of public projects or willful or careless failure to adhere to the law, policies, guidelines in the procurement, allocation or disposal of public property, there would be no integrity, confidence, honesty objectivity, impartiality, accountability or discipline in public service. **iii. Violation of the Principles of Public Finance and Public Procurement Laws** Third, the principles of public finance under **Article 201(a) of the Constitution** denote openness and accountability in the management of public finance. Secondly, **Article 201(d)** prescribes that public finances shall be used prudently and responsibly. In our view, willful and careless failure to adhere to the law, the rules or guidelines contravenes openness and accountability as such decisions would be capricious and arbitrary. Besides, where there is no prior planning as required by **Section 45(2)(c) of ACECA**, there would be no prudent and responsible use, administration, custody, maintenance of public resources and property. More so, **Article 227 of the Constitution** recognizes that public procurement should occur within a system that is fair, equitable, transparent, competitive and cost-effective. This provision further justifies and legitimises the procedures within the **Public Procurement and Asset Disposal Act (PPADA)** Spending of public resources has to be planned, and is therefore a public policy decision. This is why Kenya has an annual national budget and county budgets that itemise and plan for activities of the country and the county in that financial year. In **Section 2 of the PPADA** "Procurement" is defined in the to include planning in the supply chain system. Furthermore, **Section 53 (2) of the PPADA** further requires that the accounting officers for each public office, **prepare an annual procurement plan** that is in line with the annual budget, prior to commencement of each financial year. **cle 220** of the Constitution on form, content and timing of budgets envisions preparation and ment of plans in advance. This is also reflected in the Public Finance Management Act **sections 35 and 125** which speak to an integrated development planning process. Public procurement is how government offices acquire goods and services to effect their projects. Prior planning determines priority projects and how much will be spent on them, at both the national level and in the counties. Consequently, prior planning cannot be separated from government projects and the public procurement process.

iv. Presumption of Constitutional Validity Favors non-Deletion

Fourth, in any case, the amendment that is sought does not demonstrate or bring to purview anything that impugns the validity of the provisions sought to be amended. The author of the amendment hasn't shown which law, practice, or any Article of the Constitution that section 45(2)(b) and (c) offend. In Kenya, all laws are presumed valid, regular and unconstitutional unless one demonstrates any unconstitutionality or illegality in any of its provisions. This is what is referred to as the *presumption of constitutionality of a law*. The doctrine presupposes that statutes (as well as regulations and administrative decisions) are presumed to be constitutional, regular and valid in the sense that the individual or entity seeking to impugn a statute bears the onerous onus of demonstrating the unconstitutionality, irregularity or invalidity. In the same breath, the onus is on the challenger to demonstrate that a right or fundamental freedom has been infringed, at which point the burden would shift to the State to demonstrate that the infringement would survive the limitation test in Article 25 of the Constitution.

In the Memorandum of objects and reasons of the Bill, nothing explained there links the amendment sought to any unconstitutionality. In its current form, Section 45 of ACECA does not conflict with any provisions of any law. No invalidity or unconstitutionality of this provision has been demonstrated before Parliament. If a law does not offend any other law or the Constitution, and where it cannot be impeached on any grounds, the *presumption of constitutionality holds* that Parliament enacted such a law validly and considered all factors relevant.

Reversing the presumption of validity imposes the evidential burden on the person who seeks otherwise.
In the Tanzanian case of **Ndyanabo –V- Attorney General (2001) 2 EA 485** in which the said court presided over by the Hon. Chief Justice Samatta stated as follows: -

"…until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative".

"*…since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."*

		This case was cited with approval by the High Court in ***Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party) [2022] eKLR*** This doctrine has been recognized in classical writing as well as judicial authorities: ***Cooley on Constitutional Limitations (1972)*** reprint at p 183: *"The constitutionality of a law, then is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard."* ***Black on Interpretation of Laws (1911) p 110:*** *" Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality.* *Legislators, as well as judges, are bound to obey and support the Constitution, and it is to be understood that they have weighed the constitutional validity of every Act they pass. Hence the presumption is always in favour of the constitutionality of a statute; every reasonable doubt must be resolved in favour of the statute, not against it; and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable."* It is our firm view that Parliament is prohibited from passing or amending legislation which is a colourable attempt to defeat the objects and purposes of the Constitution. The amendment as proposed is a blatant and barefaced attempt to render ineffectual and ineffective Articles 10, 73 and 201 of the Constitution.

		V. The Proposed Amendment is Discriminatory and Violates the Equality Provisions of the Constitution Article 27(1) provides that every person is equal before the law and the right to equal protection and equal benefit of the law. Further, under Article 27(2), the state shall not discriminate directly or indirectly against any person on any ground. The equal benefit and protection of the law essentially means that all Kenyans are entitled to equal protection and benefit of the law irrespective of their professions. That is to say that the safeguards as well as the prohibitions under section 45(2)(b) and (c) apply to and binds all Kenyans of different walks of life and professions. If the relevant section is to be amended in pursuit of the objects that the sponsor of the Bill suggests, that is: "to remove the inordinate and the undue criminalization of flaws in public procurement law", the same would be discriminatory for the reason that the broader purport and tenor is only to benefit a particular group of persons who apply the procurement law. Given that ACECA applies to all persons who apply all laws in Kenya, whether or not those laws relate to procurement cannot be the only basis for amendment and deletion of a provision targeting all persons (in charge of administration, custody, management, receipt or use of any part of public revenue or property). If section 45(2) is to be amended merely because it poses an inordinate and undue criminalization of flaws in public procurement law, the same is discriminatory in that it targets to protect only procurement officers in public office. To the extent that the amendment and deletion isn't targeted at accountants, clerks, tea servers, directors, legal officers, human resource professionals, it goes against the principle of equality of all before the law and the equal benefit of all before the law. **vi. Only Penal Laws can Provide Criminal Accountability for Corruption and Ethical Violations** We note that the sponsor of the Bill alleges that there are statutes that are mentioned in the draft Bill which are sufficient to address the infractions (i.e. the Fair Administrative Action Act, PPADA, Employment Act). We would wish to reiterate that the said laws are not penal laws and cannot therefore provide accountability and sanctions for conduct constituting corruption, lack of integrity and ethical violations. The other statutes so mentioned do not prescribe or proscribe, in the specific terms, as section 45(2) does, the kind and specific conduct that constitute a criminal offence. One has to show that those

		other statutes are also capable of criminally sanctioning the breaches. If indeed they do deal with other forms of sanctions, the same cannot be a basis for the repeal of a law. **vii. International Obligations** Kenya was the first country to both sign and ratify the United Nations Convention against Corruption ("UNCAC") in 2003. The historical context of successive and economically detrimental grand corruption scandals perpetrated by public officials in Kenya in the period spanning the 1980's to the early 2000's, may explain this immediate ratification of UNCAC by the Kenyan government. UNCAC requires the formation of domestic laws to implement these internationally recognized norms, practices, and principles in fighting corruption in State Parties. It therefore forms the basis for the establishment of ACECA. Further, **Article 17 of UNCAC** envisages the criminal prosecution of public officials who intentionally embezzle, misappropriate or in any other unlawful way divert public resources that are entrusted to them by virtue of their office. The provision envisages that State Parties shall establish legislations and take other relevant measures to recognize such actions or omissions are criminal offenses. Section 45 (2) of ACECA is the legal, domestic manifestation of Article 17 of UNCAC, showing Kenya's compliance with the international regime in this regard, thus far. The proposal by Hon. Ruku for administrative sanctions to supplant criminal prosecution of willful and careless disregard for public procurement laws and procedures, contravenes international law and should not be allowed to pass. **Viii. Criminalization of ACECA offences** The law envisions the offences listed in Section 45 of ACECA to be criminal in nature, in line with international law, demonstrated above. The Public Finance Management Act, for instance, contains the following provisions from which seriousness and criminality of procurement related offences can be inferred: **Section 79** requires public officers to comply with laws relating to national government resources. **Section 147:** the accounting officer of a county assembly shall monitor, evaluate and oversee the management of their public finances. **Section 153 (1)** - The accounting officer for a county Government entity—

		(a) is responsible for the management of the entity's assets and liabilities; and (b) shall manage those assets in such a way as to ensure that the county government entity achieves value for money in acquiring, using or disposing of those assets. **Section 196** criminalises spending public money otherwise than authorised by the Constitution, an Act of Parliament or County legislation, and prescribes a punishment of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both in addition to provisions under Article 226(5) of the Constitution. These offences cannot therefore be termed as being merely administrative flaws, capable of being administratively addressed. Further, none of the proposed alternative laws including the Fair Administrative Act and the Employment Act clearly stipulate culpability for such offences, hence, they would go unpunished despite the huge negative impact to the public. Furthermore, *mens rea* (the criminal mind) for these offences is already well established and set out in ACECA. The *mens rea* for the offences is set out as **"willfully (intentionally) or carelessly"** failing to comply with any law or applicable procedures and guidelines relating to procurement and asset disposal. In the criminal trial process, an accused person is granted fair trial under **Article 50 of the Constitution**, for these elements to be proven based on admitted evidence, for a conviction to issue. It therefore follows that justice and rule of law should be allowed to take its course. As such, there is no threat of infringement of individual rights, hence no justification for an amendment of the Act. An amendment to the Act will to the contrary infringe on the Constitution and the rights of the public.

Presentation to be done by Transparency International

Section	Specific clause/ Provision of the Bill	Proposed amendment/ recommendation	Justification/ Rationale for Recommendation
2	Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection (2) and substituting therefor the following new subsection- "(2) An officer or person whose functions concern administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for- (i) Sub-standard or defective goods; (ii) Goods not supplied or	**The deletion of S. 45 (2) (b) and (c) should be rejected on the grounds that:** 1. It is not in the public interest to remove the culpability prescribed on persons in charge of administrative, custody, management, receipt or use of any part of public revenue or public property.	It does not align to constitutional provisions as stipulated below. **Article 10 (2)** on national values and principles of governance which include: accountability, rule of law, good governance and integrity **Article 201** on principles of public finance which include: (a) openness and accountability (d) public money shall be used in a prudent and responsible way (e) financial management shall be responsible, and fiscal reporting shall be clear. **Article 227** on procurement of public goods and services Due to the huge negative impact of corruption related to procurement, to the public and to the economy, these offences are best addressed as criminal offences with criminal sanctions.
		The deletion of S. 45 (2) (b) and (c) should be rejected since: 2. the law envisions these offences to be criminal in nature, as demonstrated by the provisions of the Constitution and other relevant laws.	The Public Finance Management Act contains the following provisions from which seriousness and criminality of offences of corruption relating to procurement can be inferred: **Section 196** criminalizes spending public money otherwise than authorized by the Constitution, an Act of Parliament or County legislation. **Section 79** requires public officers to comply with laws relating to national government resources. **Section 147:** the accounting officer of a county assembly shall monitor, evaluate and oversee the management of their public finances. **Section 153 (1)** - The accounting officer for a county Government entity— (a) is responsible for the management of the entity's assets and liabilities; and (b) shall manage those assets in such a way as to ensure that the county government entity achieves value for money in acquiring, using or disposing of those assets.

	not supplied in full; or (iii) Services not rendered or not adequately rendered."		These offences cannot therefore be termed as being merely administrative flaws, capable of being administratively addressed. Further, none of the proposed alternative laws including the Fair Administrative Act and the Employment Act clearly stipulate capability and culpability for such offences hence they would go unpunished despite the huge negative impact to the public.
		The deletion of S. 45 (2) (b) and (c) should be rejected since: ***3.*** Mens rea (the criminal mind) for these offences is already well established and set out in the Act. As such, there is no threat of infringement of individual rights, hence no justification for an amendment of the Act. An amendment to the Act will to the contrary infringe on the Constitution and the rights of the public.	The mens rea for the offences is set out as "willfully (intentionally) or carelessly" failing to comply with any law or applicable procedures and guidelines relating to procurement and asset disposal. Therefore, an accused person is granted fair trial under these section since these elements must be proven for a conviction issue. It therefore follows that justice and rule of law should be allowed to take its course.
		The deletion of S. 45 (2) (b) and (c) should be rejected noting that: 4. There is no ambiguity of the term "prior planning" used under section 45 (2) (c) since legislation governing public procurement envisions that there will be a process for planning in procurement and budget processes	The Public Procurement and Asset Disposal Act was enacted pursuant to **article 227 (2) of the Constitution** and it provides the framework within which policies relating to procurement and asset disposal shall be implemented. **Section 53** of the Public Procurement and Asset Disposal Act provides for procurement and asset disposal planning, to be undertaken before any procurement proceeding. **Article 220** of the Constitution on form, content and timing of budgets envisions preparation and development of plans in advance. This is also reflected in the Public Finance Management Act **sections 35 and 125** which speak to an integrated development planning process.

Recommendation

We propose that Clause 2 of the Bill be deleted in its entirety and instead, read as follows:
Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection 3 and substituting therefor the following new subsection
—

(3) In this section :-
a. "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.

"**prior planning**" means all the procedures required by law including the Public Procurement and Asset Disposal Act to be performed by public officers before commencing projects.

General Conclusion from CSPEN Members

In conclusion, the Anti-Corruption and Economic Crimes (Amendment) Bill, 2023 (National Assembly Bill No. 40) is unconstitutional and consequently void as has been demonstrated in the analysis above CSPEN Notes that public procurement is one of the most vulnerable sectors to fraud and corruption, and the fact that Central Government Procurement (CGP) is one of the single biggest item of public spending in the country makes this fact even more concerning.

We oppose the Bill in its entirety, based on the grounds that the proposed amendments go against the public interest, the principles of public finance (article 201 of the Constitution), leadership and integrity standards (chapter 6 of the Constitution), and the national values and principles of governance which include accountability, rule of law, good governance and integrity (article 10(2) of the Constitution). Upholding criminal sanctions for corruption offences relating to procurement is the only way to hold persons who breach the law accountable, which also serves as a deterrence for corruption and non-adherence to the law. Of the sixty (60) corruption cases finalized in court in the financial year 2021/2022, nine (9) were based on section 45(2) (b) of the Anti-Corruption and Economic Crimes Act. The total amount involved in these nine (9) cases was Kshs. 211,423,981. This shows the sheer magnitude and cost of corruption related to procurement.

If passed, the Bill will undermine the progress made in the fight against corruption since the enactment of the Anti-Corruption and Economic Crimes Act in 2003 and will pose a serious threat to the principles of competence, justice, and accountability in the management of public resources.

We submit this memo on the need to strengthen and not weaken the legal framework for anti-corruption.