

# ETHICS AND ANTI-CORRUPTION COMMISSION ACT 2011

**What you Need to Know**

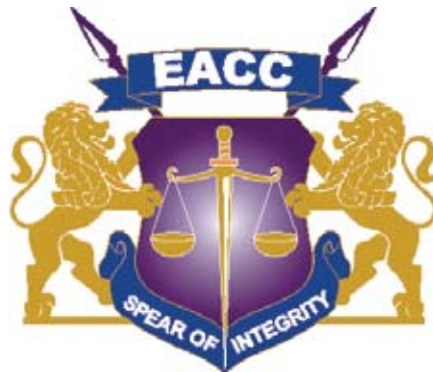


## ETHICS AND ANTI-CORRUPTION COMMISSION

*On the Frontline against Corruption*

# **THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT NO. 22 OF 2011**

## **What you Need to Know**



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Directorate of Preventive Services**

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The opinions and illustrations in this publication do not purport to be final/judicial interpretations of the Ethics and Anti-Corruption Commission Act, 2011. All efforts have been made to simplify the Act for general readership. However, this Guide, on its own, is not a substitute for the Ethics and Anti-Corruption Act. Users of the Guide are therefore encouraged to read the Act as well. Where necessary, readers may also seek expert opinion of the Commission's lawyers or other qualified lawyers.

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## **FOREWORD**

The promulgation of the Constitution of Kenya 2010 marked the start of far reaching changes in Kenya. The Constitution has significantly restructured government and sought to restore the rule of law in Kenya. Chapter Six raises the ethical bar for public officers by providing for leadership and integrity standards. It requires State Officers to exercise authority and conduct themselves in a manner that promotes public interest and brings honour to the offices they hold.

Under Article 79 of the Constitution, Parliament was required to enact legislation to establish an independent ethics and anti-corruption commission to enforce the provisions of Chapter Six on Leadership and Integrity. Article 80 also made a similar requirement for legislation to provide for the mechanics of implementing the Chapter. In accordance with Article 79, Parliament enacted the Ethics and Anti-Corruption Commission Act 2011 establishing the institutional framework for ensuring compliance with Chapter Six. The main objective of this booklet is to simplify the provisions of the Act; to enable readers to appreciate the role that the Ethics and Anti-Corruption Commission (EACC) plays in the fight against corruption and promotion of ethics in Kenya.

It is hoped that the booklet will be a useful Guide to public officers, professionals and members of the public and will help them understand more about Kenya's anti-corruption legal and institutional regime.

I therefore recommend the Guide to the readership of all Kenyans as we galvanize our efforts towards full implementation of the Constitutional provisions on ethics, integrity, anti-corruption and good governance. We will only realize the fruits of the Constitution when our taste buds for the flavour of sound leadership and integrity remain sharp.

**Commissioner Irene Keino, MBS,  
Vice Chairperson – Ethics and Anti-Corruption Commission**





## **1. BACKGROUND OF THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT**

Prior to the promulgation of the Constitution of Kenya 2010, the main legislation which governed the fight against corruption was the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. It was one of the several laws that were enacted by the NARC government to address corruption which had permeated every sphere of the society during the preceding political regimes. The Act provided a comprehensive legal and institutional framework under which anti-corruption efforts were premised. Notable among its provisions was the establishment of various organs namely the Kenya Anti-Corruption Commission as the principal body charged with fighting corruption; the Kenya Anti-Corruption Advisory Board to provide policy direction to the Commission and Special Magistrates charged with hearing and determining corruption and economic crime cases. The Act also established various offences of corruption and economic crimes, and provided for their investigation, prosecution and punishment.

In August 2010, a new Constitution was promulgated to replace the Independence Constitution. The 2010 Constitution introduced far-reaching changes in Kenya's governance structure giving emphasis to integrity, ethics and sound leadership. The effect of these provisions is that the fight against corruption is now anchored in the Constitution. Chapter six of the Constitution is wholly devoted to provisions on accountability, governance, ethics and anti-corruption in leadership. Article 79 provided that within one year of promulgation, Parliament would enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status of and powers of a Commission under Chapter Fifteen, for purposes of ensuring compliance with and enforcement of the provisions of Chapter Six.

Pursuant to this requirement, Parliament enacted the Ethics and Anti-Corruption Commission Act, No. 22 of 2011. It was assented to by the President on 27th August 2011 and came into operation on 5th September 2011. The Act establishes the Ethics and Anti-Corruption Commission comprising of a Chairperson and two members. By virtue of Section 33 of the Sixth Schedule of the Constitution, EACC replaced and succeeded Kenya Anti-Corruption Commission (KACC) in terms of carrying out the functions and exercising such powers as had been vested in KACC by law. In addition, EACC assumed the added powers and functions contained in the Leadership and Integrity Act which seeks to mainstream and promote ethics and integrity in the management of public affairs.



In summary, the current anti-corruption legal framework is contained in various legislations. The Constitution lays down the foundation and sets out the guiding principles. The Anti-Corruption and Economic Crimes Act contains the law relating to corruption, economic crime and related offences. The Leadership and Integrity Act together with the Public Officer Ethics Act focus on ethics, integrity and good leadership in public service. The Ethics and Anti-Corruption Commission Act primarily establishes the Ethics and Anti-Corruption Commission as the institution charged with implementing and enforcing these existing anti-corruption laws.





## **2. INSTITUTIONAL FRAMEWORK OF THE ETHICS AND ANTI-CORRUPTION COMMISSION**

The EACC Act primarily establishes the institutional framework for enforcement of integrity and anti-corruption laws. The Act establishes the Commission, provides for the appointment of Commissioners as well as their duties and responsibilities. In addition, the Act establishes the Secretariat which is headed by the Commission Secretary/ Chief Executive Officer.

### **i. Establishment of the Commission**

Section 3 of the Ethics and Anti-Corruption Commission Act establishes the Ethics and Anti-Corruption Commission as a body corporate with power to acquire, hold and alienate property, and perform all acts required for the discharge of its powers and functions. The Commission comprises of a Chairperson and two other members, in line with the constitutional requirement that all constitutional commissions shall have not less than three, and not more than nine Commissioners. The Commission is required to have its headquarters in Nairobi, but it is mandated to ensure that it devolves its services to all parts of the country.

### **ii. Appointment of Commissioners**

The Commissioners of EACC are required to serve for a term of six years which is not renewable. The Commissioners are competitively recruited by a selection panel, which shortlists, interviews and forwards names of three (3) qualified applicants for the position of Chairperson and four (4) others for the position of member to the President. The selection panel comprises of one person from each of the following nine bodies:

- The Office of the President;
- The Office of the Prime Minister to be replaced by a nominee from Public Service Commission after the first general election under the constitution of Kenya 2010.
- The Ministry responsible for ethics and integrity;
- The Judicial Service Commission;
- The Commission for the time being responsible for matters relating to human rights;
- The Commission for the time being responsible for matter relating to gender;
- The Media Council of Kenya;
- The joint forum of the religious organizations described in subsection (2), and
- The Association of Professional Societies of East Africa



Upon receiving names of shortlisted applicants from the selection panel, the President nominates suitable persons for appointment as Chairperson and Commissioners and forwards their names to Parliament for vetting and approval. If approved, the Commissioners are formally appointed by the President and sworn into office by the Chief Justice. If any or all of the nominees are not approved by Parliament, the President is required to submit to Parliament fresh names from amongst the persons shortlisted and forwarded to the President by the selection panel. The panel stands dissolved when all Commissioners are formally appointed.

### **iii. Duties and Responsibilities of Commissioners**

The Act provides that the functions of the Commissioners shall be to:

- (a) Assist the Commission in policy formulation and ensure that the Commission and its staff, including the Secretary perform their duties to the highest standards possible;
- (b) Give strategic direction to the Commission in the performance of its functions;
- (c) Establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sectors;
- (d) Deal with reports, complaints of abuse of power; impropriety and other forms of conduct on the part of the Commission and its staff; and
- (e) Deal with reports of maladministration including delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff.

### **iv. Appointment and Duties of the Secretary/Chief Executive Officer**

Section 16 provides for the appointment of the Secretary who shall be the Chief Executive Officer (CEO) and Accounting Officer of the Commission. The Secretary is competitively recruited by the Commissioners and approved by the National Assembly before appointment. After appointment the secretary is required to take an oath of office administered by the Chief Justice. The Secretary holds office for one term of six (6) years and is not eligible for reappointment.

The Secretary is a State Officer and is required in the performance of the functions and duties of office to be responsible to the Commission. The duties of the Secretary are:

- Carrying out of the decisions of the Commission;



- Day-to-day administration and management of the affairs of the Commission;
- Supervision of other employees of the Commission;
- The performance of such other duties as maybe assigned by the Commission.

#### **v. Secretariat of the Commission**

The Act provides for a Secretariat of the Commission comprising of:

- Professional, technical and administrative officers and support staff appointed by the Commission;
- Public officers seconded by the Public Service Commission upon request by the Commission;
- Employees of the defunct KACC who were, immediately before the commencement of the Act, serving on contract; for the remainder of their contract terms. Those employees will be subject to vetting by the Commission.



### **3. FUNCTIONS AND MANDATE OF THE COMMISSION**

The main functions and powers of the Ethics and Anti-Corruption Commission are derived from a number of laws namely:

- The Constitution
- The Ethics and Anti-Corruption Commission Act, 2011
- The Anti-Corruption and Economic Crimes Act, 2003
- Leadership and Integrity Act, 2012
- Public Officer Ethics Act, 2003
- Public Procurement and Disposal Act, 2005

#### **i. Functions and Powers of the Commission under the Constitution**

The Ethics and Anti-Corruption Commission is established pursuant to Article 79 of the Constitution with the status and powers of a Constitutional Commission to ensure compliance with and enforcement of and provisions of Chapter Six on Leadership and Integrity. This Chapter lays out integrity and ethical requirement for all State Officers. Although the Chapter requires enabling legislations to be enacted to provide mechanisms and procedures for its implementation, the Chapter is self executing and the Commission has powers to implement its express provisions in that Chapter.

Under Chapter 15 of the Constitution, the Ethics and Anti-Corruption Commission is recognized by reference as a Constitutional Commission. As such, the Commission may enjoy and exercise the functions and powers of constitutional commissions as provided under Article 252. Under this Article, the Commission may:

- Conduct investigations on any matter within its mandate
- Conduct conciliation, mediation and negotiation
- Recruit its own staff
- Perform any functions and exercise any powers prescribed by any other written law.

#### **ii. Functions and Powers of the Commission under the Ethics and Anti-Corruption Commission Act**

The functions and powers of the Commission are set out in Sections 11 and 13 respectively as follows:



## **Functions:**

- i. Develop code of ethics and promote standards and best practices in integrity and anti-corruption for State Officers.
- ii. Partner with other state and public offices develop and promote standards and best practices in integrity and anti-corruption;
- iii. Receive complaints on the breach of the code of ethics by public officers;
- iv. Investigate corruption, violation of codes of ethics and other violations of any law enacted under Chapter Six and recommend appropriate action to the Director of Public Prosecutions;
- v. Recommend appropriate action to be taken against State Officers or Public Officers alleged to have engaged in unethical conduct;
- vi. Oversee the enforcement of codes of ethics prescribed for Public Officers;
- vii. Advise, on its own initiative, any person on any matter within its functions
- viii. Raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption;
- ix. Monitor the practices and procedures of public bodies to detect corrupt practices and secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- x. Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption or the payment of compensation, or other punitive and disciplinary measures.

## **Powers:**

Section 13 of the Act sets out the powers of the Commission as follows:

- (a) Educate and create awareness on any matter within the Commission's mandate;
- (b) Undertake preventive measures against unethical and corrupt practices;
- (c) Conduct investigations on its own initiative or on a complaint made by any person, and
- (d) Conduct mediation, conciliation and negotiation.

## **iii.Functions and Powers under the Anti-Corruption and Economic Crimes Act**

Section 33b of EACCA provides that any function, transaction, investigation or prosecution carried out by or on behalf of KACC, civil proceedings or any other matter carried out under the Anti-Corruption and Economic Crimes Act or any other law, before the commencement of the EACCA, shall be deemed to have been carried out under the EACCA.



The effect of this provision as read with Section 36 is that EACC takes over the mandate of the defunct KACC under the Anti-Corruption and Economic Crimes Act, 2003. Accordingly, EACC may enforce and exercise the same powers as were done by KACC under the ACECA. Some of these functions and powers include:

- Investigations of corruption and economic crime offences as defined in the ACECA;
- Institution of proceedings for recovery of corruptly acquired property and unexplained assets;
- Institution and implementation of procedures for amnesty and pardons under section 25A and 56B of the Act;
- Police powers, privileges and immunities that facilitate investigations and prosecutions of corruption and economic crimes such as power to arrest, conduct searches, detain suspects and immunity from liability for anything done in good faith while on duty.

#### **iv. Powers and Functions of the Commission under the Leadership and Integrity Act**

The Leadership and Integrity Act, No. 19 of 2012 was enacted pursuant to Article 80 of the Constitution which provides that Parliament shall within two years of promulgation, enact a law to:

- Establish procedures and mechanisms for effective administration of Chapter Six;
- Prescribe penalties for contravention of Chapter Six;
- Provide for the application of Chapter Six to Public Officers; and
- Provide any other provisions necessary to promote the principles of Leadership and Integrity.

Under section 4 of the Leadership and Integrity Act, the Commission is mandated to oversee and enforce implementation of the Act by the various responsible bodies. In discharging this mandate, the Commission may request a state organ to assist it in ensuring compliance with and enforcement of the provisions of Chapter Six of the Constitution or the Act. The Commission may also request any public entity to carry out any functions and exercise any powers under the Leadership and Integrity Act. Where a public body fails to comply with the directions or request from the Commission, it may petition the High Court for orders compelling the public body to comply.



## **4. PROCEDURES AND MECHANISMS ON THE IMPLEMENTATION OF THE COMMISSION'S MANDATE**

### **i. Conduct of Business**

The Commissioners are required to serve on a full time basis and are mandated to meet at least once every quarter, or as often as the need arises for the execution of their functions. The quorum for any meeting of the Commission is two thirds of the members. The law further provides that no proceedings of the Commission shall be invalid by reason only of a vacancy among the members of the Commission. A decision on any matter before the Commission is made through a majority concurrence among the membership present in the meeting. The Commission may establish committees for the effective discharge of its functions, into which it may co-opt other persons whose knowledge and skills are found necessary for its functioning.

The Commission is empowered to make Regulations for the better performance of its functions. However, the Regulations it can make are limited to appointments of officers and their confirmation to offices in respect of which it is responsible. Such Regulations may also relate to matters of discipline and termination or appointments of its employees; and details relating to the practice and procedure of the Commission in the exercise of its functions.

### **ii. Statutory Reports on Activities**

Every financial year, the Commission is required to prepare an annual report detailing the financial statements and activities that the Commission has engaged in during the period. It may also include in the report the impact of the exercise of its functions, any impediments to the achievements of its objectives, or any other relevant information it considers necessary to provide for in the statement. The annual report is submitted to the President and the National Assembly, and must also be published and publicised in such manner as the Commission may determine.

### **iii. Information Management**

Article 35 of the Constitution guarantees the right of every citizen to information held by the state or any organ of the state. The Article requires the state to publish and publicize any important information that it may have which affects the nation. In furtherance of this requirement, section 29 of the Ethics and Anti-Corruption Commission Act requires the Commission to publish and publicise important



information within its mandate which affects the nation. However, the Act makes certain limitations; and provides for procedures and mechanisms in this regard. It provides that:

- The Commission may impose certain confidentiality requirements in respect of the requests for such information;
- The request may be subject to payment of a reasonable fee;
- The Commission may decline to give such information where; the request is unreasonable, the applicant has failed to satisfy certain requirements imposed by the Commission, or the information sought cannot be availed at the time it is requested.

Further to the said requirements, every member or employee of the Commission is required to sign a confidentiality agreement.

#### **iv. Regional Presence and Publicity**

Section 3(3) of the Act requires the Commission to ensure that its services are accessible to members of the public in all parts of the country in line with Article 6 of the Constitution. This Article obligates the State organs such as the Commission to ensure reasonable access to its services throughout the country.

Under section 30 of the Act, the Commission is further required to publish a notice for public information specifying the location of its principal office and its address or addresses, telephone numbers and other means of communication.

By implication, such details would include addresses and other contacts of all regional offices established by the Commission.

#### **v. Independence of the Commission, Members and Employees**

In the performance of its functions, the Commission is not subject to the direction or control of any person or authority. The Third Schedule to the Act prescribes a Code of Conduct for all members and employees of the Commission. The Code makes further provisions relating to impartiality and independence of the Commissioners and employees. Rule 1 of the Code states that every Commissioner and employee of the Commission shall impartially and independently perform their functions in good faith and without fear, favour, or prejudice; and without influence from the Government, any public officer, political party, candidate in an election or any other person or authority.

The Code also bars Commissioners and employees of the Commission from being appointed or nominated to political office or any public office during their tenure of





office. They should not in any way place in jeopardy the perceived independence of the Commissioners, or in any other manner, harm the credibility, impartiality or integrity of the Commission.

## **5. CONCLUSION**

Besides the Constitution which lays down the guiding principles, the existing law governing the fight against corruption in Kenya is contained in diverse pieces of legislation. Any person seeking to understand the anti-corruption legal and institutional framework must have an appreciation of what the various statutes provide for and how they interconnect.

This booklet has outlined and presented in a simplified format the provisions of the Ethics and Anti-Corruption Commission Act 2011. It has also made linkages between the institutional framework under the Act and the framework in other integrity and anti-corruption legislations. It is therefore an important starting point and reference source material on anti-corruption matters in Kenya.

