STAKEHOLDER CONSULTATION EXERCISE
THEMATIC VALIDATION TOOL

PART A: INTRODUCTION:

1. Kenya’s journey toward the development of a National Action Plan on Business and Human Rights was precipitated by UPR review process of January 2015 where a number of states, called on Kenya, and other countries to develop a NAP in order to promote local implementation of the UN Guiding principles. Kenya accepted the call and commenced the process of development.

2. The Office of the Attorney General, Department of Justice and Kenya National Commission on Human Rights has for the past year taken steps to develop the NAP. The NAP seeks to ensure the State performs its duty to protect in a manner that is consistent with its domestic and international obligations and to guide businesses on the measures they should take to meet their responsibility to respect human rights in their operations.


4. This far, the NAP has conducted a National Baseline assessment that evaluated current and potential impacts of businesses on human rights; regional consultations; policy dialogues and thematic working group meetings. This information can be found on the NAP website https://nap.knchr.org.
5. A First NAP draft is now complete, and at the validation phase, before final review and launch. This tool is for purposes of collecting feedback. The tool outlines the current concerns and policy actions in the NAP draft. The outline is also pegged along the 5 priority/thematic areas of the NAP: Land, Labor, Environment, Revenue Management and Access to Remedy. Feedback can therefore be received on all 5 themes, or any particular ones that a stakeholder may be interested in.

6. The questions to be answered in this validation exercise is:
   a) What Policy concerns have not been captured?
   b) What Policy Actions need to be captured?
   c) What needs to be reviewed?

7. We encourage stakeholders to submit their feedback in writing via the email swangechi@knchr.org or claries.kariuki@ag.go.ke by 15th November 2018.

**Stakeholder details:**
Name:

Contact details:

Organization/agency/County:

Date........................................
Part B: THEMATIC POLICY CONCERNS & ACTIONS IN THE CURRENT DRAFT

A. LAND

POLICY CONCERNS:

1. Land adjudication has not been done in some areas where businesses are operating or propose to operate. This complicates discussions on who are the rightful parties to be consulted and compensated, especially where individuals or communities use such land to earn their livelihood.

2. The Mining Act has not been operationalized. This denies local communities impacted by the operations of mining companies the rights and protections given by the law.

PROPOSED ACTIONS

The Government will:

1) Continue with land adjudication and registration including in areas where there is community land and land intensive projects are proposed.

2) Take legislative and policy measures on resettlement and compensation to augment the legal framework on voluntary and compulsory land acquisition. The framework will balance the interests of interests of communities as well as investors.

3) Introduce procedural guidelines for use by businesses, individuals and communities in their negotiations for land access and acquisition. These guidelines will safeguard the participation of vulnerable and other marginalized groups.

4) Raise awareness among chairs of boards and the top management of state-owned businesses regarding its expectation on the compliance with the government’s human rights obligations with special attention to land, labour and environmental impacts.

5) Encourage businesses to conduct comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent and redress human rights violations.
## B. LABOR

### POLICY CONCERNS:

1. Kenya is one of the source countries of emigrant workers and there have been reports of exploitation, cruel and degrading treatment of these workers.
2. There is no legal requirement for mandatory due diligence for businesses prior to commencement of their operations.
3. Businesses, including SMEs have a relatively low understanding of their human rights responsibilities resulting in lack of visible engagement with employees and other stakeholders on how to ensure that they respect human rights.
4. The current voluntary initiatives established and adopted by business associations on different human rights issues such as the Code of Conduct, do not have a strict reporting and compliance mechanisms. Therefore, they fail to offer businesses that have ascribed to them the required guidance and supervision to ensure that their operations respect human rights.
5. Currently there is no regulatory requirements or common practice for businesses to adopt human rights policies, make them internally and externally public, and report on compliance.
6. There is no mandatory requirement for human rights due diligence and businesses, including state-owned enterprises, have not embraced the practice of engaging those whose rights are most likely to be impacted by their operations in any kind of human rights due diligence.

### PROPOSED ACTIONS

The Government will:

1. Work with host governments to take appropriate measures to promote safe and fair labour migration including agreements on free exchange of information, and more stringent regulation of employment agencies. The government will also explore measures for providing legal and psychosocial
support services to victims of unfair labour practices.

2. Raise awareness among chairs of boards and the top management of state-owned businesses regarding its expectation on the compliance with the government’s human rights obligations with special attention to land, labour and environmental impacts.

3. Provide guidance to businesses on their role in environmental protection, including offering specific guidance on measures they should take to respect others’ right to a clean and healthy environment.

4. Undertake a sensitization campaign targeted at the SMEs and their employees to help them understand and respect the relevant human rights obligations.

5. Develop guidelines for businesses to ensure that they are sensitive to the implications of their operations on gender - women, including labour practices and anti-discrimination.

6. Disseminate the Kenya Climate NAP and promote dialogue among businesses on the climate change so that they can adopt practices that reduce climate change and ensure resilience. It will also encourage businesses to continuously assess their risks to the environment beyond submission and approval of the EIA.

7. The committee will disseminate this NAP to businesses, communities at high risk of business-related human rights abuses and government agencies.

8. Encourage business to adopt human rights policies, including measures that they will take to ensure at their operations respect human rights.

9. The committee will encourage employment agencies to secure legal protection and care of persons who have suffered or been subjected to abuse abroad.

10. The committee will encourage State-owned enterprises (SOEs) to respect and be held to the same standards as those applicable to private business: state regulatory and oversight bodies will ensure the respect of human rights by SOEs and other businesses that receive export credit and similar state support.

11. Encourage businesses and business associations to use human rights and sustainability as criteria for industry awards. Encourage those that are doing will to offer guidance to their peers and the SMEs in their supply chains.
### C. REVENUE MANAGEMENT

#### POLICY CONCERN:

1. There is no legal requirement for mandatory due diligence for businesses prior to commencement of their operations.
2. Although the Companies Act envisages non-financial reporting for companies, there are no guidelines on how this can be done or what the parameters of such reporting entail.
3. There is low awareness about human rights obligations of businesses and the UNGPs framework by SOE’s boards of directors and senior management.
4. There is no guidance on how SOEs and other businesses that enjoy government support may conduct human rights due diligence.
5. There have been concerns about government’s support to businesses whose operations have the potential for serious environmental degradation.
6. There is no requirement for human rights criteria in awarding bids during procurement for public goods and services.
7. There is need to improve policy coherence between government agencies promoting human rights on the one hand, and those promoting trade and investments.
8. International trade agreements do not necessarily give premium to their human rights implications, including access to remedy for local communities, their impact on the environment and ensuring local employees and sub-contractors enjoy legal and constitutional protections.
9. There may be cases of illicit financial flows by subsidiaries of companies operating in the country denying the company revenue that could be used to improve provision of basic services.

#### PROPOSED ACTIONS

**The Government will:**

1. Work with stakeholders including devolved governments to operationalize revenue sharing from mining as envisaged by the Mining Act 2016.
2. Develop a natural resource revenue management policy and regulatory framework for administering and managing natural resource revenue paid to
host communities. This framework will seek to promote equity, inclusivity and community decision-making and will include training to enhance the capacity of communities to manage their own affairs.

3. Develop guidelines for non-financial reporting under the Companies Act 2015

4. Consider a review of the Companies’ Act to require mandatory human rights due diligence for certain categories of businesses.

5. Raise awareness among chairs of boards and the top management of state-owned businesses regarding its expectation on the compliance with the government’s human rights obligations with special attention to land, labour and environmental impacts.

6. Develop guidelines on human rights due diligence for SOEs and other businesses that receive export credit and similar state support.

7. Review existing public procurement policies with due regard to the state’s human rights law obligations. For example, including demonstrable business respect for human rights as part of the minimum threshold to qualify for government tenders.

8. Training: Work with partners to provide training for government agencies involved in the promotion and regulation of businesses on its human rights obligations.

9. Review of policies: Review current policies on that promote growth of trade and investment into the country to ensure that they are in line with their international human rights law obligations.

10. Maintaining adequate domestic policy space:

11. Ensure non-derogation from the acceptable standards of environmental protection during negotiations and signing of bilateral and multilateral trade and investment agreements.

12. Ensure that there is non-derogation from the applicable labour standards when negotiating international trade agreements.

13. Review current agreements on double taxation to ensure that they are not used to facilitate IFFs and tax evasion by businesses.

14. Encourage businesses to conduct comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent and redress human rights violations.

15. Encourage the use of non-financial reporting by state-owned enterprises to include their impacts on human rights and the mitigation measures that they
### D. ENVIRONMENT

#### POLICY CONCERNS:

1. The potential of environmental pollution by business operations in the extractive industry including oil exploration and salt mining.
2. Compromise of access to water and sanitation by businesses, including by discharge of effluent into waterways.
3. Poor disposal of solid waste, toxic and hazardous substances.
4. Loss of biodiversity due to destruction and encroachment for commercial reasons.

#### POLICY ACTIONS:

**The Government will:**

16. Consider withdrawing support to projects that have a disproportionately high potential of harming the environment; and consider incentives for businesses that exemplify excellence in environmental protection practices.

17. Encourage businesses to conduct comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent and redress human rights violations.

18. Develop a natural resource revenue management policy and regulatory framework for administering and managing natural resource revenue paid to host communities. This framework will seek to promote equity, inclusivity and community decision-making and will include training to enhance the capacity of communities to manage their own affairs.

19. Encourage businesses to conduct comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent and redress human rights violations.
## E. ACCESS TO REMEDY

### POLICY CONCERN:

1. Kenya is one of the source countries of emigrant workers and there have been reports of exploitation, cruel and degrading treatment of these workers.
2. There is no legal requirement for mandatory due diligence for businesses prior to commencement of their operations.
3. There are no guidelines for companies operating in conflict areas to ensure that they are not complicit, and their activities do not escalate the conflict.
4. Lack of strict enforcement of the applicable environmental standards in relation to the impacts of business operations on the environment.
5. The cost of litigation is still high for local communities, which acts as a barrier to pursuit for remedies.
6. There is room for more appreciation of the current trends on business and human rights by different government agencies that have judicial and non-judicial mandates over businesses.
7. The law does not require businesses to have grievance mechanisms.
8. Public procurement laws do not have human rights indicators as a basis for scoring and evaluating bids.
9. Businesses do not as a matter of practice, establish credible operational-level grievance mechanisms to improve access to remedy for those with concerns about their conduct.
10. The current voluntary initiatives do not have a public reporting and accountability requirements. This makes it difficult to hold businesses to account on their policy commitments on human right, including access to remedy.
11. Many communities experiencing the negative environmental impacts of business operations lack the capacity to monitor and document compliance with the relevant standards by the businesses.

### PROPOSED ACTIONS:

The Government will;
1. Work with host governments to take appropriate measures to promote safe and fair labour migration including agreements on free exchange of information, and more stringent regulation of employment agencies. The government will also explore measures for providing legal and psychosocial support services to victims of unfair labour practices.

2. Raise awareness among chairs of boards and the top management of state-owned businesses regarding its expectation on the compliance with the government’s human rights obligations with special attention to land, labour and environmental impacts.

3. Develop guidelines for Kenyan companies operating in conflict areas about how to avoid contributing to human rights abuses.

4. Encourage businesses to conduct comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent and redress human rights violations.

5. Encourage businesses to cooperate with government agencies and other stakeholders in facilitating remedies for business-related human rights violations. This includes actively participating in policy discussions on access to remedy and adopting policies that enhance access to remedy.

6. Ensure businesses comply with all applicable laws as well as respect internationally recognized human rights laws and standards as they relate to land access and acquisition and natural resource management, environment and revenue management.

7. Work with local and international partners to support its legislative and judicial arms to be well versed with the current jurisprudence. Kenya will look for opportunities to provide the following institutions with relevant training on business and human rights:
   - The judiciary through the Judicial Training Institute
   - Members of Parliament especially the Committee on Human Rights.
   - Regulatory bodies including NEMA and Capital Markets Authority
   - Constitutional bodies including the KNCHR and The Gender and Equality Commission
   - Nairobi Center for International Arbitration

8. Ensure that information on both judicial (proceedings) and non-judicial
mechanisms including the environment tribunal (alternative dispute resolution mechanisms) is widely disseminated. This will include targeting regions where businesses that pose great risk to the environment are operating, to promote access to justice on environmental matters.

9. Conduct a law review to consider the extent to which the current laws promote respect for human rights by business. The areas that will be considered include:
   - The current companies law and the possibility of using the reporting requirements to have a social and economic impact component.
   - Consider the possibility of mandatory periodic human rights diligence for businesses that have a high risk of causing human rights harm to their communities, workers and other stakeholders.
   - Review current trade-promotion and related laws to ensure consistency with the bill of rights and that they promote respect for human rights by businesses.
   - Kenya will consider law review to include the extraterritorial jurisdiction for companies registered in Kenya but with operations in other countries.

10. Ensure more stringent regulation of the registration and operations of employment agencies involved in recruitment of Kenyans for employment in businesses abroad. Workers recruited by these employment agencies will be trained before departure at the cost of the recruitment agencies.

11. Kenya will consider the relevant public procurement laws and standards to assess the possibility of introducing compliance with labour standards as evaluation criteria for bid qualification for government contracts. Such review will consider the necessity to give preference to businesses that give primacy to human rights due diligence and make public reports about their risks to human rights and how they mitigate such risks.

12. Given the relatively low level of understanding of the need and constitutional imperative to respect human rights by businesses, including small and medium - sized enterprises, work with other partners to disseminate information through brochures and other media to both duty bearers and rights holders. The information will include guidance to businesses to adopt human rights policies and establish credible operational-level grievance mechanisms.

13. Devise ways of improving access to legal aid by victims of business-related human rights abuses

14. Continue with the ongoing efforts to improve the public confidence in the
judiciary to ensure that victims of human rights abuses, including by businesses, refer their grievances to judicial institutions.

15. Review the operations of the Human Rights Division of the High Court, Employment and Labour Relations Court, and the Environment and Land Court to ensure that they are accessible avenues for remediying business-related human rights abuses. The review shall include an assessment on the whether the courts are expeditious and affordable.

16. The Office of the Attorney General will work with the National Land Commission, The National Gender and Equality Commission, The Kenya National Commission on Human Rights, the National Environment Tribunal to:

17. Enhance inter-agency coordination in handling complaints of business-related human rights abuses that related to their mandate, including where there is an overlap of their mandate, including environment, labour and land matters.

18. Improve their technical capacity to handle grievances support them to effectively play their regulation and law enforcement roles in relation to the environment.

19. Support the KNCHR audit environmental impact of business operations. This will be in due regard to the fact that the right to a clean and healthy environment is now enshrined in the Kenya Constitution’s Bill of Rights.

20. To build the capacity of the relevant agencies to handle labour-related grievances related to businesses, including:

21. Consider increasing the number of labour inspectors to monitor and enforce labour standards including by businesses, with special attention to the implementation of the mandatory sexual harassment policies, the payment of minimum wages, non-discrimination against women and marginalized and minorities.

22. Review the remuneration of labour inspectors and ensure strict monitoring and reporting of their activities to guarantee their independence

23. Assess the suitability of joining the Extractive Industries Transparency Initiative.