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## MEMORANDUM

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**TO:** The Honourable Chairman and Members, Committee on Legal, Constitutional, and Parliamentary Affairs, Parliament of Ghana  
**FROM:** GII/CDD-Ghana/GACC on behalf of Coalition of Civil Society Organizations  
**SUBJECT:** Office of the Special Prosecutor Bill, 2017: Analysis and Comments  
**DATE:** September 6, 2017  
**CC:** Office of the Attorney-General

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We are grateful to your Committee for the invitation and opportunity to submit this memorandum to assist the Committee in its review and consideration of the *Office of the Special Prosecutor Bill, 2017*.

We represent an ad hoc coalition of national civil society organizations (the “Coalition”) that share a common and longstanding commitment to fighting corruption and improving the quality of governance in Ghana through advocacy, research and publication, and public education. The Coalition is under the joint leadership of Ghana Integrity Initiative (GII), Ghana Centre for Democratic Development (CDD Ghana), and the Ghana Anti-Corruption Coalition (GACC). In April 2017, the Coalition, with funding support from DFID’s Strengthening Action Against Corruption (STAAC) programme, organized a series of multi-stakeholder roundtable meetings to discuss and solicit participants’ views on the proposed Office of the Special Prosecutor. The participants at these roundtables were drawn from the private sector, the NGO community, and the media. A key output of the roundtables was the formulation of a set of recommendations for the consideration of the office of the Attorney-General in its development and drafting of the Office of the Special Prosecutor bill (“OSP Bill”). The recommendations were duly submitted to the Attorney-General (“AG”). Subsequently, the Coalition members were invited by the AG to a two-day Stakeholders’ Conference called to elicit participants’ comments and feedback on a limited-circulation draft of the OSP Bill. Following the Stakeholders’ Conference, which was held in Accra in June 2017, the Coalition submitted another memo to the AG. We note that the OSP Bill that is

now before your Committee, dated July 14, 2017, incorporates many of the recommendations of the Coalition.

The Coalition supports passage of the OSP Bill. We submit this memorandum in part to underscore that support but, principally, to highlight and propose changes to certain aspects and portions of the bill that, in our opinion, require further reflection, modification, and fine-tuning in order to achieve the policy goals and objectives set forth in the Memorandum to the Bill.

The remainder of the memorandum proceeds as follows. In Part I, we set forth and discuss briefly the General Principles that have guided our review and informed our views of the Bill as outlined in this memorandum. We commend these General Principles for your consideration. In Part II, we provide a systematic, clause-by-clause analysis of the provisions in the “structure and governance” half of the Bill, covering clause 1 through clause 29. We perform the same exercise in Part III, with a review and analysis of the provisions in the remainder of the Bill (clause 30 through clause 79), which relate principally (but not exclusively) to the treatment of the proceeds of crime and realizable property. Our clause-by-clause analyses in Parts II and III focus only on those parts or portions of the Bill that we believe need further reflection or modification. Where necessary, we offer suggestions to improve the text. In other instances, we simply raise questions and provide commentary to provoke further thinking and deliberation on particular provisions.

## **I. GENERAL PRINCIPLES**

A comparative study of national anticorruption agencies undertaken by the Coalition with the support of STAAC reveals a fair amount of diversity in the institutional or organizational forms and structures that are employed by countries to investigate and prosecute corruption. Some anticorruption agencies are established by the national constitution; many more are established by legislation; and yet others operate simply as functional or operating units or divisions within a general-purpose prosecution

authority. The designation “Special Prosecutor” or “Independent Prosecutor” is not one that is commonly used, even though specialized bodies or officers with power to investigate and prosecute corruption cases are not uncommon. The term Special Prosecutor appears to have originated in the United States, where in 1973 the Attorney General named private lawyer and Harvard law professor Archibald Cox as Special Prosecutor to investigate and prosecute all Watergate-related offences.<sup>1</sup> Regardless of what form an anticorruption investigative/prosecution authority might take, or the source or breadth of its legal and operational mandate, our comparative study shows that effective or successful anticorruption investigative-cum-prosecution authorities, by whatever name called, share certain common characteristics and features. We have reformulated these here as General Principles applicable specifically to the proposed OSP. In deriving these General Principles, we have been influenced and guided also by the *Jakarta Statement of Principles for Anticorruption Agencies*, November 2012; by the United Nations Convention against Corruption (UNCAC); and by the Legislative Guide for the Implementation of UNCAC. We believe that for the proposed Office of the Special Prosecutor to be successful, the law establishing and operationalizing it must follow these General Principles, which are set forth below.

1. The OSP must have a **clear and specific mandate**. The OSP must be established with clear and specific legal mandate and powers. This is important both to prevent the OSP getting tied down in needless litigation over “jurisdiction” as well as forestall inter-agency rivalry over competing or overlapping jurisdiction. It is not necessary or even desirable to grant the OSP explicit monopoly of investigation or prosecution in the area of corruption. Some inter-agency overlap in this area is inevitable and, arguably, desirable. However, given the multiplicity of institutions in this area, it is

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<sup>1</sup> The Special Prosecutor in the U.S. context, now generally referred to as Independent Counsel, is neither a permanent office nor a corruption-specific investigator/prosecutor. Rather, it is established on an as-needed basis, on the authority of the Attorney-General, usually in response to political pressure, where the President or some other high-level Executive branch official is suspected of criminal wrongdoing and the Attorney-General is deemed incapable, on conflict of interest grounds, of fairly and impartially leading the investigation and possible prosecution.

important that there is clarity and understanding as to which agency has primacy or superiority over investigation or prosecution of corruption cases when these fall within the statutory mandate of the OSP. Where a matter falls within the statutory mandate of the OSP, because it involves corruption or a corruption-related offence implicating persons covered under the OSP law, the OSP must have primacy or superiority over all other competing statutory or executive investigative agencies. This means that, in cases of such overlap, the OSP must be empowered to assume leadership of the investigation or prosecution, either by directing another agency to assist it in the conduct of the investigation or, where an investigation or prosecution has already been commenced independently by another agency, by “taking over” or directing the conduct of the investigation or prosecution. This, of course, will not apply to corruption investigations commenced independently by or before the Commission on Human Rights and Administrative Justice (CHRAJ), as, under the 1992 Constitution, CHRAJ is not subject to the direction or control of any person or authority in the performance of its functions. However, as CHRAJ lacks authority to prosecute corruption, the OSP would be the appropriate prosecution authority to take over corruption investigations completed by CHRAJ.

2. The Special/Deputy Special Prosecutor must be **appointed by a process that is transparent and inclusive**. Public trust in the impartiality of the Special/Deputy Special Prosecutor begins with the process by which they are recruited and selected. As the necessity for the OSP arises, principally, from a lack of public confidence in the ability or willingness of the AG to investigate or prosecute impartially corruption involving politically influential persons, it is important that the SP (DSP) is selected in a manner that instills confidence in the impartiality and professionalism of the office. Opening up the pool of qualified candidates to as many interested persons as possible who meet specified nonpartisan criteria is preferable to a closed and opaque recruitment process where a nominee is handpicked singlehandedly by the AG or the President, without consultation with any other body or without recourse to a transparent or competitive process. Beyond the nomination, the process of ratification or approval of the nominee

for SP (DSP) must be similarly transparent and, ideally, involve the participation of a bi- or multi-partisan body. Public confidence in the impartiality of the OSP, however, goes beyond the choice of the SP (DSP); it extends to staffing of the *office* as a whole. Thus, it is equally important that staffing of the office be transparent and free from partisanship or political manipulation. This means that the OSP must have the power to hire and fire its own staff in accordance with clear and transparent rules and procedures.

3. The Special/Deputy Special Prosecutor must be clothed with **security of tenure**. The SP/DSP must not be removable during their statutory term of office, except for statutorily specified cause and in accordance with a clearly delineated procedure equivalent to the procedure for the removal of a key independent officeholder such as a Justice of the superior courts. Furthermore, to assure continuity in the office, a vacancy in the position of SP/DSP arising out of the resignation, death, or removal of the incumbent must be filled in accordance with the statutory appointment process within a specified time period (e.g., 90 days after the vacancy occurs). This is to prevent the situation where the OSP is left without a substantive head for an indefinite period of time following the occurrence of a vacancy in the position of SP.

4. The OSP must have **adequate and reliable financial resources**. To carry out its mandate effectively, the OSP will need sufficient financial resources. The Office must be entitled to timely, planned, reliable and adequate resources for the discharge of its mandate. As an incentive, the OSP should be allowed to retain a portion of the proceeds it recovers to fund its operations.

5. The OSP must be **accountable, both internally and externally**. The OSP must develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize any misconduct and abuse of power by its officers and agents. It is advised that the OSP develop and adopt a Code of Conduct requiring its officers and staff to adhere to the highest standards of ethical conduct, backed by a strong monitoring, compliance, and sanctions regime. The OSP must also be accountable to the public. This means periodic and regular reporting on its

activities to the public. In addition, the OSP should be accountable through periodic reporting to Parliament through the Attorney General.

## **II. ANALYSIS OF THE STRUCTURE AND GOVERNANCE PROVISIONS OF THE BILL**

### **1. Establishment of the Office of the Special Prosecutor: Clause 1**

It is not clear what the legal significance is of establishing and designating this new agency as an “Office”, as opposed to, say, an “Authority”. We note, of course, that the political promise made by the President during the 2016 election campaign, which promise the OSB Bill is designed to effectuate, used the term Office. Perhaps this also explains why the Act establishing the Economic and Organized Crime *Office* (Act 804) served as the template for the drafting of the OSP Bill. On the other hand, the National Anticorruption Action Plan, 2014, which is the current national policy framework for fighting corruption, provides for the establishment of an Independent Prosecution *Authority* under its Strategic Objective 4 (13). We are unsure what legal significance or consequence, if any, attaches to either of these (or various other) designations or nomenclature employed in domestic legislation establishing one or the other public body. The Memorandum accompanying the Bill does not assist us in this regard, as it does not shed any light on whether it matters, as a matter of law or practice, that the proposed body is to be established as an Office, rather than as an Authority (or some other type of agency). We raise this issue of nomenclature only to draw the attention of the Committee to the fact that, we have noted in our laws the existence of different or alternative formulations for establishing public bodies, and to advise, assuming these alternative formulations carry legal significance, that, in establishing this new body, Parliament must endeavor to employ the organizational format that best ensures the functional effectiveness of the proposed anticorruption agency.

## 2. Functions of the Office: Clause 3

**Subclause (1)(b):** We suggest that, as in subclause (1)(a) relating to offences under the Public Procurement Act, subclause (1)(b) be revised to make clear that the Office is authorized to investigate “**and prosecute**” cases of alleged corruption and corruption-related offences under the Criminal Offences Act.

**Subclause (1)(c):** We assume that subclause (1)(c) is intended as a “catch-all” provision designed to enable the Office investigate and prosecute all other cases of alleged corruption or corruption-related offences that may arise under any other statute other than those specifically named in subclauses 1(a) and 1(b). If our assumption is correct, then we suggest, in the interest of clarity, that subclause (1)(c) be reworded to read as follows: “**investigate and** prosecute alleged cases of corruption and corruption related **that may arise under any other statute** involving public officers, politically exposed persons and persons in the private sector implicated in the commission of the offence.”

**Subclause (1)(g):** We suggest a rewording of subclause 1(g) so that it conveys clearly that the Office shall receive “**and act upon**” complaints “**and information**” (which would include tips or leads) from any person or source on a matter than involves or may involve corruption or corruption related offences. As currently written, subclause 1(g) appears to imply that a private person may trigger the processes of the Office only by submitting a formal “complaint” to the Office. This understanding is later reinforced by **Clause 26**, which outlines the procedure for making a “complaint”. We are of the opinion that the current text of subclause 1(g), read in conjunction with Clause 26, is unduly restrictive, as it does not appear to contemplate or cover tips or other information that may be brought to the attention of the Office, including by persons who may wish to invoke the protections of the Whistleblower Act.

**Referrals:** We propose the addition of a new penultimate subclause to read as follows: The Office shall “receive and act upon referrals made to it by and as a result of investigations of alleged corruption or corruption related offences carried out by the

Auditor-General, the Commission for Human Rights and Administrative Justice or any other public body.” The inclusion of this new provision under Clause 3 would render redundant the more generic “referral” provision contained in Clause 26 of the current draft.

**Subclause (3)(b):** We suggest that, in its quarterly public reporting of the convictions secured in respect of cases prosecuted, the Office be required also to disclose the value of the proceeds recovered on account of those convictions.

**Subclause (4):** We respectfully strongly object to the inclusion in the Bill of subclause (4) and would advise that it be deleted in its entirety. Our interpretation of subclause (4) is that, it purports to draw a distinction between “petty corruption” and “grand corruption” and to confine the mandate of the Office to cases of “grand corruption”. However, subclause (4) is couched in such broad and vague terms that, if enacted into law, it would serve only to invite constant and needless litigation over the mandate or jurisdiction of the Office. Worse still, the language used in subclause (4) (“a vast quantity of assets”; “a substantial portion of the resources of the country”; “threaten the political stability of the country”; “threaten the substantial development of the country”) is bound to present courts invited to interpret and apply the provision with grave difficulty and uncertainty as to practical meaning of those terms. Moreover, the distinction which subclause (4) apparently purports to establish between “petty corruption” and “grand corruption” proceeds on the rather false assumption that cases of corruption can easily or readily be separated out into those that are “petty” and those that are “grand”. In practice, corruption is not so easy to categorize at the outset. The nature of corruption cases is such that a matter might appear “petty” on face value or at first blush yet turn out, in the end or in the aggregate, to involve substantial amounts or widespread racketeering. Similarly, what might appear initially to be a case of grand corruption could turn out, disappointingly, to be a rather “petty” case as the investigation unfolds. The best policy, then, is to leave it to the judgement of the OSP and its team of professional investigators and prosecutors to determine, on the basis of their cumulative experience and assessment

of the available evidence, whether a particular case of alleged corruption is worth the commitment of the scarce resources of the Office. In reality, the constraint of limited resources, coupled with the fact that the operational resources of the Office would depend, in part, on its ability to recover substantial proceeds, should be expected to disincline the OSP to chase after low value cases. The fact that the mandate of the Office is already limited, principally, to alleged corruption involving “public officers” and “politically exposed persons” is sufficient indication that the policy of the law is that the OSP would devote its resources to high value targets, not “small fish”.

### 3. Governing body of the Office: Clause 5

**Subclause (1):** The composition of the governing board of the Office, comprising officials or representatives from agencies with some expertise or role in the investigation of corruption or corruption related offences, suggests that the board is designed primarily to facilitate inter-agency cooperation and coordination between the OSP and cognate public agencies. In that regard, it is not clear that it is necessary to include on the board a private legal practitioner nominated by the Ghana Bar Association (GBA). It would make more sense, given the inter-agency character of the board, to replace the GBA nominee with a representative of the Public Services Commission (PSC).

We further suggest that, in the interest of effective inter-agency coordination and in deference to the hierarchical structure of the respective public bodies, the “one representative of the Ghana Police Service” (subclause (1)(d)) and the “one representative of the Commission for Human Rights and Administrative Justice (subclause (1)(g)) be nominated by the Inspector General of Police and the Commissioner of CHRAJ, respectively. Furthermore, the “one other person” (who shall be a female) appointed to the board pursuant to subclause (1)(i) should be drawn from the civil society anticorruption community.

**Subclause (2):** This provision should be reworded to make clear that (i) neither the Special Prosecutor nor the Deputy Special Prosecutor shall be nominated to serve or act

as chairperson of the Board; and (ii) the chairperson has no other powers or function other than to convene and preside over meetings of the Board.

**Subclause (5):** This provision, while fairly standard in legislation establishing public corporate bodies, is not sufficiently specific or clear as to the boundaries of the Board’s authority vis-à-vis the operations or performance of the functions of the OSP. In light of the culture or experience of board overreach in some public agencies, we propose that this subclause (5) be further expanded to make clear, at the minimum, that: (i) neither the Board nor any of its “outside” members shall interfere or get involved in the day-to-day operations or decisions of the OSP relating to the investigation or prosecution of cases or discuss or review any specific cases under investigation or consideration by the OSP; and (ii) the Board is set up principally to facilitate inter-agency cooperation and coordination between the OSP and the public agencies represented on the Board.

4. Tenure of office of members of the Board: Clause 7

**Subclause (3):** This provision, and for the matter the entire clause 7, should be revised to reflect the fact that, as membership of the Board is either ex-officio or nominee/institutional in character, a member of the Board cannot simply “resign” his or her membership of the Board unless he or she has ceased to occupy the position which entitles him or her to membership of the Board or another official has been nominated to replace him as representative of his employer-agency. In either event, the member shall cease automatically to be a member of the Board.

5. Nomination and appointment of the Special Prosecutor: Clause 12

**Titles of sections:** This section of the Bill, covering clauses 12 through the end of clause 17, is better titled “Special Prosecutor and Deputy Special Prosecutor”, instead of “Administrative and Financial Provisions”. The title “Administrative and Financial Provisions” should be saved for the section of the Bill covering clause 18 through the end of clause 25.

**Subclause (1)(a):** It is unclear what particular previous experience, training, job, or career would qualify a person or lawyer as one who “possesses the relevant expertise on corruption matters”. We suggest that this particular qualification for appointment as Special Prosecutor be deleted, as it is likely to invite unnecessary disputation or unduly limit the ability of the Attorney-General to nominate a suitable candidate for appointment.

**Subclause (2):** Making the Attorney-General the person responsible for nominating a candidate for approval (by Parliament) and appointment (by the President) as Special Prosecutor affirms the fact that, under the terms of Article 88 of the Constitution, the prosecution power, formally and ultimately, belongs to the Attorney-General. Thus, to appoint a Special Prosecutor without prior recourse to the AG might raise a constitutional problem, as the authority to prosecute, although a specie of executive power, is, under our Constitution an exceptional kind of executive power that is vested specifically and exclusively in the AG. Accordingly, it is a power that may not be reassigned to another person except on the authority of the AG. The grant of the nominating power to the AG is, therefore, necessary to make the appointment of the Special Prosecutor constitutionally compliant.

At the same time, it is important, for the sake of building public confidence in the impartiality of the Special Prosecutor (and the Deputy Special Prosecutor), that the selection of the nominee by the Attorney-General be done through a process that is transparent, open, and inclusive. Thus, instead of singlehandedly naming the nominee without recourse to any public process or consultation, the AG should invite applications from suitably qualified and interested candidates, preferably by advertising the position. Applicants could then be put through a series of screening interviews conducted by an ad hoc panel set up for the purpose by the AG comprising persons nominated by designated stakeholder groups or institutions, including civil society, the business community, traditional authorities, the clergy, media, and the Public Services Commission. The ad hoc panel would present the AG with a final short-list of 2 or 3 recommended candidates,

out of which the AG must nominate one for vetting and approval by Parliament and appointment by the President. This suggested process, or some variation of it, would inject the necessary transparency and inclusiveness into the selection of the nominee by the AG.

**Subclause (5):** This provision subjects the Special Prosecutor to the existing public officeholders asset declaration regime, as contained in article 296 of the Constitution and section 1 of the Public Office Holders (Declaration of Assets and Disqualification) Act, 1998 (Act 550). The Deputy Special Prosecutor is subject to the same asset disclosure regime, pursuant to subclause (5) of Clause 15. It is not enough, however, to subject only the SP and the DSP to asset/net worth disclosure obligations. The career staff of the OSP, including investigators, must be similarly subject to these provisions. The law must also place on the Board of the OSP an obligation to develop, in consultation with the AG, a Code of Conduct binding on all officers and staff of the OSP and implement it within six months of the establishment of the Office. The Code of Conduct must be backed by a clear and strong regime of compliance, including monitoring and training, and sanctions.

**Subclause (8):** Instead of having the President appoint some other person as Special Prosecutor in an acting capacity for up to six months upon the occurrence of a vacancy in that position, why not simply apply the provisions of Clause 16(2) and have the Deputy Special Prosecutor act in the position until a new substantive Special Prosecutor is appointed in accordance with the statutory appointment process? Furthermore, six months is too long a time to keep a vacancy in the position of Special Prosecutor open. Between three and four months (or, more specifically, 90 to 120 days) seems more appropriate, having regard to the need for continuity and effectiveness in the functioning of the Office.

#### 6. Functions of Special Prosecutor: Clause 13

**Subclause (1):** It is not clear what it means to say that the Special Prosecutor “is **accountable** to the Board in the performance of the functions under this Act.” It is

preferable to state in what specific ways the Special Prosecutor shall “account to” the Board. For example, through a periodic reporting obligation. This is necessary to ensure that “accountable to the Board” does not become the entry point or loophole through which the Board gets to intrude or interfere needlessly in the investigative or prosecutorial functions of the OSP or the SP.

A more fundamental question, however, is why the SP must account to the Board, as opposed to the AG. As at least the prosecution half of the SP’s powers are exercised on the authority of the AG, it would seem reasonable to require the SP to submit a report to the AG. In fact, Clause 3(2) of the Bill already requires the OSP to submit a report to the AG within one month of the conclusion of a case or recovery of proceeds. Some similar reporting obligation could be placed on the SP in relation to other aspects of its work. While the drafter’s concern may be to safeguard the professional autonomy of the SP vis-à-vis the AG, it is also important that any grant of professional “independence” be balanced by an appropriate degree of “accountability” to the delegating authority (AG), even if it is merely nominal, in order to recognize the AG’s ultimate constitutional responsibility for prosecution.

7. Nomination and appointment of Deputy Special Prosecutor: Clause 15

**Subclause (1):** Please see our earlier comment in relation to Clause 12, subclause (1)(a), at Section II (5), page 11 of this memorandum, where there is an identical qualification for the appointment of a person as Special Prosecutor.

8. Divisions of the Office: Clause 18

**New Title:** As we suggested in our first comment to Clause 12, in Section II (5), page 10 of the memorandum, the portion of the Bill covering Clause 18 through 25, should be titled “Administrative and Financial Provisions”.

**Subclause (1)(a):** Since the Bill creates in Clause 19 a Secretariat headed by a Secretary, who is made responsible for the day to day administration of the Office, it is

not necessary to establish an “Administrative Division” of the Office. The Secretariat will, in effect, serve as the central administration for the OSP, serving the functional Divisions of the Office, namely Investigations, Prosecutions, and Assets Recovery and Management.

9. Appointment of other staff: Clause 20

**Subclause (1):** While this subclause (1) of Clause 20 appears to be yet another standard or boilerplate provision in legislation establishing public agencies, its necessity or value is very doubtful indeed. Of course, in theory, one could argue that every person who is employed in any capacity or agency within the Executive branch of government holds their position as an appointee of the President. However, this idea cannot reasonably be taken literally, as to do so would make the President the exclusive or ultimate appointing authority for every office or position in every public agency established by statute. It would defeat the special character of the OSP, as a body established to exercise part of the AG’s prosecutorial prerogative on the authority of the AG, to subject it to this routine practice. We feel strongly that inclusion of this provision in the enacted law, with its implication that the staffing of the entire OSP is a prerogative of the President, would make nonsense of the whole notion of establishing a specialized anticorruption investigation and prosecution body that is operationally autonomous of the Executive. We suggest that this provision, and the related subclause (2), be deleted in its entirety. Recruitment of personnel for the OSP should be the responsibility of the Special Prosecutor, with a role for the Board in the case of recruitment of “management level” personnel—as under Clause 19. In the alternative, if subclauses (1) and (2) must be retained, we propose that, upon the appointment of the SP, the President undertake to delegate to the SP the formal appointing authority in respect of other staff of the OSP. Without that authority, the SP would be severely handicapped in his or her ability to lead the OSP.

**Subclause (3):** This provision does not state or indicate who may transfer or second “other public officers” to the Office of the Special Prosecutor. Again, in order to

preserve the institutional and operational autonomy of the Office, any secondment of personnel from other public agencies to the OSP must be upon the express request of the Special Prosecutor and agreed between the SP and the relevant agency, possibly in consultation with the Public Services Commission.

10. Funds of the Office: Clause 21

**Clause 21:** The funds of the Office should be defined specifically to include the OSP's statutory share of the proceeds of realizable property as provided for under Clause 69(1).

**III. ANALYSIS OF THE OPERATIONAL AND RECOVERY OF PROCEEDS OF CORRUPTION PROVISIONS OF THE BILL**

1. Seizure of tainted property: Clause 30

This clause attempts to deal with civil forfeiture through an administrative process, whereby the OSP can seize property up to sixty days if it has reasonable grounds to suspect that the property is tainted with corruption or corruption related offence. However, it does not outline a procedure for the administrative seizure of property in the sixty days that the property is in the control of the OSP.

**Subclause (3):** The provision does not address civil immunity or immunity from civil liability. In fact, the entire Bill is missing a general "immunity from liability" provision that would immunize authorized officers of the Office from civil and criminal proceedings or liability for acts done in good faith in the performance of the functions and exercise of the powers of the Office. It is imperative that such an immunity clause be added to the Bill.

**Subclause (4):** It is not clear whether application to the Court for an order for continued seizure and retention is to be made ex parte or on notice and what test is to be applied by the Court in determining the application.

This provision is silent on what happens to the property after the expiration of the two years, if charges have been preferred but the case is still not concluded.

There is a danger of this clause being used abusively, such as where, after the two years have expired and no charges have been preferred, the OSP may attempt to confiscate or retain control of the asset. This concern is not merely hypothetical, as there is precedent from the current practice of EOCO in relation to Freezing Orders after the statutory twelve-month period has expired but no charges have been preferred.

## 2. Property tracing: Clause 35

This clause should include as one of the orders the OSP could apply to the Court for, an Account Monitoring Order. With this order, which is an order served on a bank as part of the investigative process, the OSP would be able to trace funds in a bank account in order to trace and identify the true owner of a property.

## 3. Record of seized property: Clause 36

**Subclause (1):** This provision allows the OSP with a Court Order to dispose of property within seven days of seizure where the property is perishable.

While the officer who makes the seizure is required to make a written record of the property and hand it to Special Prosecutor, there is no mention of the owner of the property or what information, if any, shall be given to him or her.

The provision is equally silent on whether the application to the Court is made on notice to the property owner or ex parte. Since application is made within seven days for perishable goods, the implication is that it can be made without notice to the owner. If that is the intention, then the Regulations which will implement the Bill must ensure that a record of the property that is taken as part of the search is given to the owner, who must then be informed that an application is to be made to liquidate the property and the

proceeds paid into the OSP account, particularly, if time is of the essence that the property should be disposed of to ensure that some value is retained.

4. Returned of seized property: Clause 37

An application by a third party claiming return of seized property should be made within 90 days. This provision reinforces our belief that the absence of a similar right of the property owner or claimant to make an application under Clause 36 or to be provided information of the seizure of the property is an oversight that needs to be corrected.

5. Disclosure of funds and other assets: Clause 47

**Subclause (3):** This provision states that “The Special Prosecutor shall not reveal the content of the disclosure except in accordance with this Act or on the order of the Court.” It is not clear whether this authorizes the Special Prosecutor to verify the contents of the Disclosure Notice. Without the ability to do so, the Disclosure Notice may not serve its purpose.

As currently drafted, the Disclosure Notice is to be served on the person when he or she has been charged and the information is to be used for the confiscation or pecuniary penalty order. There is no similar provision made for a Disclosure Notice to be obtained as part of the Freezing Order (in the previous Clauses) during the investigation process of the case. This is an unfortunate omission and needs to be reconsidered, as the point of a Freezing Order is that it is “necessary to facilitate the investigation”. Therefore, to enable the effectiveness of the Freezing Order, the OSP should have the tool to compel a suspect to disclose the extent of his assets, as soon as possible to ensure that it is captured by the Order and remains in the jurisdiction or can be traced and confiscated at a later date.

6. Application for confiscation or pecuniary penalty orders: Clause 50

This provision permits the making of an application for a confiscation order against tainted property whilst the defendant is still on trial, which suggests that the property can be confiscated or the defendant's interest in the property can be determined before the conclusion of the trial. If this is the implication, it should be made clear, as it would help to overcome the delay that is currently built into confiscation proceedings. If third party claims can be determined early in the process, that would make the enforcement of the confiscation order when made, more effective.

7. Notice of Application: Clause 51

**Subsection (1)(a).** As the OSP is required to maintain a website, it must be directed to publish Notice of the Application on its website, in addition to publication in the Gazette or a daily newspaper of national circulation.

**Subclause (1)(c):** This provision allows a non-defendant who has an interest in a property that is liable for confiscation to adduce evidence at this stage of the proceedings, with Notice of the Application (for a confiscation order) having been given by the OSP. What is not clear is when the OSP is expected or required to make the application for a confiscation order. Given that the application can be made during or before conclusion of trial, assuming the defendant is not convicted and the third party has failed to satisfy the Court that they have a bona fide interest in the property, is the implication that the property can be confiscated?

This seems to be an attempt at non-conviction based forfeiture. If such a procedure is intended, it would be quite problematic, as it is not clear upon what basis the asset might be confiscated.

8. Procedure on application: Clause 53

**Subclause (2):** It is under 53 (2) that a third party claim against a property can be determined before the conclusion of the trial, as well as before sentencing of the defendant, which makes it all the more pertinent that the Bill makes it clear when an application for a confiscation order can be made and whether the confiscation of the property is dependent on the conviction and, if not, upon what basis an asset could be confiscated without a conviction.

9. Procedure against property where a person dies or absconds: Clause 54

This provision permits confiscation in one of two exceptional circumstances. First, the State can confiscate a decedent's assets based on a mere allegation or information that he or she was involved in the commission of corruption or corrupted related offence and, prior to his or her death, a warrant was issued for his/her arrest. Second, where a suspect absconds and there is information alleging the commission of corruption, and a warrant is issued based on that information, if reasonable but unsuccessful attempts have been made to arrest the individual during the three months period after the warrant was issued, the OSP can apply for the property to be confiscated.

Each of these scenarios represents yet another attempt at non-conviction based forfeiture of assets. Such an outcome would be proper only if the underlying action is one that lies against the property (action *in rem*), which would require that evidence be brought against the property to establish the criminal taint. It would be problematic, however, if the underlying action relies on an allegation against a person (an action *in personam*) as the basis to confiscate assets, even if the allegation may have not ripened or into an investigation.

In relation to any third party interest that may be affected, protection is only given in the situation where the accused has died and not in relation to where the suspect has absconded. This provision is equally problematic.

#### 10. Confiscation Order and Pecuniary Penalty Order.

The Bill attempts to draw a distinction between confiscation order and pecuniary penalty orders, in relation to the calculation and their enforcement. The distinction is not clear, as both are in essence a debt owed by the individual to the State, following on from a conviction and should be enforced in the exactly the same way. For example, it is not clear why a default sentence is imposed in relation to a pecuniary penalty order but a not a confiscation order. Similarly, the basis of the benefit calculation in relation to corporate structure is set out as regards a pecuniary penalty order but not in relation to confiscation order.

#### 11. Utilisation of Proceeds: Clause 69

The Bill makes it plain that 40% of the realised funds should be paid to the OSP, with 30% going to “institutions of relevance”, a term that defined in the interpretation section, Clause 77. Whilst this is a step in the right direction, as it provides a necessary incentive to the OSP and ties its financial resources, in part, to its success in executing its mandate, in the interest of transparency it would be better if there were a breakdown of the amounts that each relevant institution could expect to receive.

Curiously, no provision is made for payment of any portion of the realized funds to an individual, whether a complainant or a whistleblower, whose information or tip assisted the OSP in successfully investigating or prosecuting a case or identifying and recovering the proceeds of the corruption or corruption related offence. We strongly propose that this omission be corrected and that individuals who assist the OSP with valuable information,

which information and assistance shall have been documented in advance, be rewarded with a specified share of the net realized funds.