

SUBMISSION on the KENYA NATIONAL POLICE SERVICE BILL 2011.



COMMONWEALTH HUMAN RIGHTS INITIATIVE

Commonwealth Human Rights Initiative
B-117, 2nd Floor
Sarvodaya Enclave
New Delhi - 110017
INDIA

Tel: 91-11-43180200

Fax: 91-11-2686 4688

www.humanrightsinitiative.org

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international NGO working for the practical realisation of human rights in the countries of the Commonwealth.

SUBMISSION on the NATIONAL POLICE SERVICE BILL 2011.

ANALYSIS AND RECOMMENDATIONS FOR AMENDMENTS.

Introduction

This submission represents the Commonwealth Human Rights Initiative's (CHRI) consideration of the National Police Service Bill and our corresponding recommendations. Previously we have made a submission on the version of the draft Bill released in December 2010. We have now analysed the latest version¹ of the draft Bill, identified gaps and weaknesses, provided suggestions for amendment as well as recommended the inclusion of provisions that will better define police powers and functions, clarify the limits of political control, strengthen accountability, and bring laws into line with international best practice regarding use of force and firearms. We understand that the draft Bill has been approved by Cabinet and we ask that the Parliamentary Committee (or members of Parliament reviewing the draft Bill) to consider our submission.

CHRI is an independent, non-partisan, non-governmental organisation headquartered in New Delhi, India. CHRI's areas of work are focused on the right to information, access to justice, and human rights advocacy.² Since 2001, CHRI's Access to Justice programme has been promoting police reform in the Commonwealth East African countries of Kenya, Tanzania and Uganda. CHRI has also published two reports on policing for each country, conducted regional roundtable conferences and helped establish civil society police reform networks. Since 2009, CHRI has been working in partnership with the African Policing Civilian Oversight Forum (APCOF) and the East African Police Chiefs Cooperation Organisation (EAPCCO) and in collaboration with the East African Community to articulate common standards for policing in the region. In Kenya, CHRI was instrumental in the establishment of the civil society forum TURF - The Usalama Reform Forum - which is an organisation that brings together NGO's working in the area of security sector reform. Through TURF, CHRI has made contributions to the legislative reform process underway in the policing arena, with submissions made to the Police Reform Implementation Committee (PRIC) on Bills including the Independent Policing Oversight Authority Bill and the Private Security Industry Regulation Bill.

The passage of a National Police Service Bill is a vital part of the extensive police reform process currently underway in Kenya. The Bill addresses many important elements of policing that have been identified in both the new Constitution and the report of the Task Force, such as community policing, internal discipline, and the creation of the Kenya Police Service structure overall. With this central piece of legislation, what must be ensured is that the true intent and spirit of the reforms is put into practice. Such vigilance will help to create truly democratic policing.

¹ Circa July 2011 - this is the latest version of the Bill accessible to CHRI

² For more information on CHRI's activities, please visit www.humanrightsinitiative.org



Analysis

Section 10. Functions and powers of the Inspector-General.

Section 10(1)(f) requires the Inspector-General of Police (IG) to develop a plan setting out policing priorities as well as a budget for the same. Given the role of the Police Service Commission, their membership, and the information and knowledge they have about policing in Kenya, this planning should happen in consultation with them. Together, they would be well placed to set the policing policy and the IG would then implement the same. Planning should also look further forward than simply one year, as in there should be provision for strategic plans to be made as well as annual plans. Further, the plans should be placed before parliament along with the budget for approval. This will ensure that policing becomes bipartisan and is not misused by the party in power.

Sections 10(1)(g) and (o) gives the Inspector-General of Police (IG) the power to designate any outpost, units or unit bases in the county, and identify places of custody. It is submitted that the designation of outposts, units and places of custody should more properly be a joint function of the government (both National and County levels) and the Police. This is an administrative decision, best made by government for several reasons, including that they are better placed to take into account proper resourcing, and that government designation of places of custody would provide more transparent decisions, prevent arbitrary designation of places of detention, and help to ensure standards are maintained in detention.

The current list of functions does not establish reporting as a function of the Inspector General. It is submitted that this function be included in section 10 to ensure that the general public is aware of crime statistics, complaints against the police and resolution of such complaints. Public reporting encourages accountability of the Police to the public. It is noted that a separate section needs to be included bill regarding reporting.

Recommendations -

That ss.10(1)(f) be re-drafted as follows:

“(i) in consultation with the National Police Service Commission, develop a plan before the end of each financial year, setting out the priorities and objectives of policing for the following financial year, as well as long-term strategic plans for the Police Service;

“(ii) in consultation with the National Police Service Commission, prepare the budget before the end of each financial year, setting out the priorities, objectives of policing and expenditure for the following financial year”

That the following provision be added in relation to ss.10(1)(f):

“The Inspector-General will cause the policing plans and budget referred to in ss.10(1)(f) to be forwarded to the Minister in charge. The Minister

must then cause the plans and budget to be placed before Parliament for approval.”

That the designation of police stations, outposts, units and places of custody be made a role of the government, and that such a role be specified in this legislation, as follows:

The government/minister in charge may, in consultation with the County Assembly and Inspector-General of Police create as many Police Stations and places of custody as deemed necessary, duly keeping in view the population, the area, the crime situation, the workload in terms of law and order and the distances to be traversed by the inhabitants to reach the Police Station.

That a further subsection be included as a function of the Inspector-General of Police under section 10:

To compile, maintain and publish public reports every six months including, but not limited to, the following information:

- (i) crime statistics*
- (ii) statistics regarding the resolution of crime*
- (iii) statistics regarding the use of force and firearms by the police*
- (iv) number and type of complaints against the police and resolution of such complaints*
- (v) crime prevention measures undertaken*
- (vi) new outposts and units, new places of detention*
- (vii) any other relevant matters in accordance with this Act.*

In completing reporting requirements, the Inspector-General of Police should collaborate with the County Policing Authorities, the Independent Policing Authority and other organisations as necessary.

In relation to the relationship between the Inspector-General - as the office holder with independent command over the Police - and the Executive, Article 245 of the Constitution outlines the permissible directions that may be given to the I-G and also those areas where independence from the political must be maintained. Whilst that Article of the Constitution is a welcome reform, in that it establishes and defines the limits of power of both the Executive and the I-G, there is room within this Bill for further expansion on the matter.

In particular, considering the extensive list of powers, functions and duties of the I-G set out in s.10, it might be questioned what is to occur if there is a conflict between a direction from the Cabinet concerning some matter (as envisaged under Article 245 of the Constitution), and the opinion or decision of the I-G.

It is further noted that sub-clause (8) of Article 245 of the Constitution states that “Parliament shall enact legislation to give full effect to this Article”.

Considering the above, it is recommended that certain provisions be added to the Bill to strengthen the constitutional provision and to clarify, as far as possible, these issues.

Recommendation - That the following clauses be added to the Bill within this Part, following section 10:

“In accordance with Article 245(4) of the Constitution, the Cabinet secretary responsible for police services may lawfully give the Inspector-General a direction with respect to any matter of policy for the National Police Service.

In accordance with Article 245(5) of the Constitution, any direction given to the Inspector-General by the Cabinet secretary responsible for police services must be in writing.

When a direction is so given, the relevant Minister must cause a copy of the direction given to the Inspector-General to be—

- (a) published in the Gazette within eight days of the date of the direction; and
- (b) laid before Parliament within six sitting days of the date of the direction if Parliament is then in session, or, if not, within six sitting days after the commencement of the next session of Parliament.³

The Inspector-General is obliged to follow all such lawfully given directions of policy.”

Section 12. Procedure for appointment of the Inspector-General and Deputy Inspectors-General

Section 12 sets out the procedure for appointing the Inspector-General and Deputy Inspectors-General.

Section 12(5) establishes a vetting panel to shortlist qualified candidates. CHRI note the recent decision of the Constitutional Implementation Oversight Committee to merge the National Commission on Gender with the Kenya National Human Rights Commission⁴. Subsection 12(5)(f) can therefore be deleted.

Hence, it is noted that there will be five people on the vetting panel - from the Office of the President, the Office of the Prime Minister, the Judicial Service Commission, the Kenya Ombudsman Commission (*CHRI understand that this Commission is still separate to the KNHRC*) and the Kenya National Human Rights Commission.

Recommendation - deleted subsection 12(5)(f) as the National Commission on Gender is being merged with the Kenya National Human Rights Commission.

³ The drafting of this clause is partly taken from section 8 of the *Police Act* (South Australia) 1998, Australia.

⁴Ongiri.I, *Kenya: Rights And Gender Commission to Merge-CIOC*, <http://allafrica.com/kenya/>, 10 August 2011

Sections 15 and 22. Functions of the Deputy Inspector-General of the Kenya Police Service and Deputy Inspector-General of the Administration Police Service.

Section 10 of the Bill provides that the Inspector-General has the responsibility of ensuring that the National Police Service fulfils the objectives and functions as set out in the Constitution, and gives the Inspector-General operational and management command over the entire Service, as is also set out in the Constitution. The Constitution then provides that both the Administration and the Kenya Police Services are to be headed by Deputy Inspector-Generals. Section 15 of this draft Bill sets out the functions of the Deputy Inspector-General of the Kenya Police Service, and section 22 does the same in relation to the Deputy Inspector-General of the Administration Police Service. These two sections, in effect, set out the powers and responsibilities of both Deputy Inspector-Generals.

The Bill lists one of the functions as “(e) manage, monitor and evaluate the Kenya Police Service”. It is submitted that the National Police Service Commission should take a leading role in any evaluation of the Police Service.

As CHRI has suggested in relation to the National Police Service Commission Bill 2010⁵, the Commission would be a suitable body with the breadth of expertise and information to hand to formulate a performance evaluation framework. Then, jointly with the Police, the Commission could monitor and evaluate the Service. The performance evaluation could also be more elaborate.

Subsection (h) provides the function of providing internal oversight of the Kenya Police Service. Given the role and functions of the National Police Service Commission - and, indeed, the Deputy IG’s membership in the Commission - the section should specify that this role can be undertaken in conjunction, or cooperation, with the Commission. Further, the procedure for internal disciplinary action must be set down in the rules/regulations, and this Bill could specify that.

The same comments and analysis are made in relation to the Functions of the Deputy Inspector-General of the Administration Police, set out in s.22 of the Bill.

Recommendations - that s.15(e) and 22(d) be deleted from the Bill. That the task of monitoring and evaluating the police service be placed with the National Police Service Commission. The following clauses are a suggestion as to what could be inserted in the National Police Service Commission Bill regarding this function:

“Review of police performance

(1) The Police Service Commission shall regularly evaluate and review the performance of the Police Service as a whole. For this purpose, the Commission shall:

(a) identify performance indicators to evaluate the functioning of the Police Service, which shall, inter alia, include operational efficiency, public satisfaction, victim gratification vis-à-vis police investigation and response, accountability, optimum utilisation of resources, and human rights record;

(b) review and evaluate organisational performance of the police against: (i) the Annual Plan provided for in Section xx of the Act, (ii)

⁵ This is the 2010 version of the National Police Commission Bill

performance indicators as identified and laid down by the Commission itself (iii) resources available with, and constraints of the police;

(c) lay down policy guidelines for gathering information and statistics related to police work; and

(d) suggest ways and means to improve the efficiency, effectiveness, accountability, and responsiveness of the police.

(2) In order to assist the Commission to regularly review and evaluate police performance, the cabinet secretary may establish an Inspectorate of Performance Evaluation, headed by a police officer superannuated in the rank of xxx assisted by as many staff members as prescribed and drawn from amongst serving or retired police officers, social scientists, police academics and crime statisticians, appointed by the xxx from panels of names recommended by the Commission.

(3) In evaluating police performance, the Commission may by itself or through its Inspectorate or any other agency or officers authorised by them in this behalf:-

(a) visit any Police Stations, offices or any other police establishment;

(b) examine any document and records maintained by the police; and

(c) make arrangements to conduct various kinds of surveys including public opinion surveys.

Reports of the Commission on police performance

(1) The Commission shall, at the end of each calendar year, prepare and forward to the Administrator an annual report on police performance, which shall, inter alia, include recommendations for improvement.

(2) This report shall be laid before the Parliament in the budget session and shall be published as a public document, easily accessible to the public.”

That s. 15(h) and s22(h) be drafted as follows:

“(h) provide internal oversight of the Kenya Police Service in conjunction, and by cooperating, with the National Police Service Commission”.

That this Bill, or the National Police Service Commission Bill, state that the procedures for internal disciplinary action be set out in the rules/regulations.

Section 17. Power to compel attendance at police station.

This section describes the power of police officers to compel persons to attend a police station if it is believed that they have information relevant to an investigation. It goes on to describe certain rights and obligations in relation to questioning that occurs at police stations.

Whilst this section makes it clear that the right to silence is maintained - in that a person is not required to answer questions if it tends to expose the person to a criminal charge, penalty or forfeiture - there needs to be further obligations placed on the police to ensure the guarantee against self incrimination is fully preserved.

To properly protect that right, s.17(3) must include a requirement that a person is informed of this right, or given a caution by the police officer, prior to any questions being asked of them. The warning should include that which is included in subsection (4), that any statement may be recorded and may be used in evidence, but should specify that it may be used in evidence *against them*.

Recommendation - that s.17(3) and (4) be re-drafted as follows, including the amendments and additions in italics below:

“17 (3) A person is not required to answer any question under this section if the question tends to expose the person to a criminal charge, or to a penalty or forfeiture. *A police officer who intends to question a person under this section must inform that person, in a language that they understand, that they are not required to answer any questions that may tend to expose them to a criminal charge/s prior to commencing any questioning.*

(4) A police officer must record any statement made to him or her by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person whom the police officer is to be charged or who has been charged with committing an offence, the police officer must warn the person that any statement which may be recorded may be used in evidence *against them.*

Section 18. Power to require bond for attendance at court.

This section gives a police officer the power to set conditional bonds in relation to the release of persons pending court proceedings. However, it is submitted that no officer should simply have complete discretion as to whether a person is granted bail or not. Further, allowing police to set bail may interfere with the requirement that all arrested persons be produced before a Magistrate within 24 hours⁶, which is a vital way of monitoring the process.

Setting bail is more properly a function of the court and not the police. Giving police this power places a significant amount of discretionary power in their hands and, as the investigating agency, they should not be deciding on bonds for release. Also, when judicial officers consider the bail of an individual, certain factors are weighed, and evidence can be presented as to the circumstances of the accused and his or her likelihood of appearing before the Court.

Recommendation - That s.18(1) be deleted, and all decisions as to the setting of bonds and bail remain with judicial officers.

Section 19. Maintenance of order on roads, etc.

This section empowers the Kenya Police Service to regulate and control traffic and prevent “obstructions” in public places. It is submitted that a definition of an

⁶ As guaranteed in Article 49 of the Constitution of Kenya.

obstruction in a public place be included in the bill to make clear that the KPS will can only act in relation to certain specified circumstances.

Recommendation - include definition of “obstruction” in the bill.

Section 20. Power to take photographs, fingerprints and other forensic evidence.

This section empowers police officers to take samples and other items which can be termed forensic evidence. Unlike many other jurisdictions⁷, this Bill does not distinguish between the procedures of taking photographs, fingerprints, foot prints, palm prints, measurements etc and ‘other forensic evidence’ referred to in the section. ‘Other forensic evidence’ may be more intrusive, such as the taking of blood, DNA sample by way of buccal swab or otherwise, hair sample, use of lie detectors etc.

Although the bill states that the I-G will prescribe Service Standing Orders regulating the taking of forensic evidence, it is submitted that, due to the nature of more intrusive or intimate procedures, the bill itself should impose different requirements. This is due both to the nature of such procedures, and also the important right against self-incrimination that must always be protected. As such, the law should specify that consent of the accused, as well as a court order (depending on the procedure in question), is required.

Subsection (6) allows for the use of reasonable force in circumstances where a person has been convicted of refusing to permit certain evidence to be taken. Although the bill states that the force used should be reasonable, the Bill still should, at the very least, specify the limits of the force that can be employed. Certainly, officers should not be allowed to employ firearms or other weapons, or the threat thereof, and the force used should not be such as to occasion injury to the person. Ideally, the use of force would be excluded altogether and, rather, the person who continues to refuse to provide such evidence would face the punishment properly determined by a Court.

Recommendations - That this section distinguish between the taking of forensic evidence that is non-intrusive and those procedures that are intrusive. That there be separate provisions in relation to the taking of forensic evidence *other than* that which is non-intrusive (fingerprints, foot prints, palm prints, measurements and photographs).

That there be a requirement of informed consent of the accused (such as in the case of an adult accused consenting to his or her DNA sample being taken by way of buccal swab) and/or for court orders to required in cases of intrusive forensic procedures, or procedures that could tend to infringe upon the accused’s right against self-incrimination (such as in the case of a minor/juvenile giving a DNA sample).

⁷ For example, see the Crimes (Forensic Procedures) Act 2000 (NSW), Australia, where ‘intimate’ and ‘non-intimate’ forensic procedures are distinguished. Also, *Smt. Selvi & Ors v State of Karnataka* (2011) Supreme Court of India No. 1267 of 2004, regarding, *inter alia*, safeguards and guidelines to apply in relation to certain kinds of evidence collection including lie detector tests and narco-analysis.

That such a legislative scheme include factors and considerations for the court to balance in making its decision, so as the court protects the rights of the accused and is not merely 'rubber-stamping' applications made by the police.

That s.20(6) be deleted. Instead, the offence outlined in s20(5) is sufficient, unless the Bill also includes a further offence for failing to comply with a court order.

Part V - Directorate of Criminal Investigation.

Part V of the Bill deals with the Directorate of Criminal Investigations, a division of the Police Service that is established to specifically deal with criminal intelligence and investigation in a specialised manner.

Section 25. Qualifications of the Director of Criminal Investigation

This section sets out the qualifications required by the Director of Criminal Investigation. Whilst this section of the Bill references the essential Chapter 6 of the Constitution relating to those serving in public office, it is submitted that there should be additional requirements for appointment to this post.

It is submitted that, similar to section 11(3) regarding qualifications for appointment of the I-G, there should be a section that states that a person is not qualified for appointment as the Director of Criminal Investigation if the person:

- Is a member of any of the levels of government, or has been in the last 5 years;
- Has previously been convicted of any offence including a disciplinary offence;
- Has violated the Constitution; or
- Is an undischarged bankrupt.

Recommendation - That a further subsection be included section 25 as per below:

25(2): No person shall be qualified for appointment as the Director of Criminal Investigation if the person -

- a) Is a member of parliament or county assembly, is a governor or a deputy governor;**
- b) Has served as a member of Parliament, county assembly, trade union or held an office in a political party in Kenya in the preceding five years;**
- c) Has previously been convicted of any offence including a disciplinary offence;**
- d) Has violated the Constitution; or**
- e) Is an undischarged bankrupt.**

Section 27. Functions of the Director.



Similar to section 15 (e) and 22(e) of the Bill regarding the Police Service, subsection 27(d) states that the Director shall “monitor and evaluate the Directorate”. It is submitted that the National Police Service Commission should take a leading role in any evaluation of the Directorate, in collaboration with the Director.

Further, similar to Subsection 15(h), subsection 22(g) provides the function of providing internal oversight of the Directorate. Given the role and functions of the National Police Service Commission - the section should specify that this role can be undertaken in conjunction, or cooperation, with the Commission.

Recommendations - that s.27(d) be amended to state that the task of monitoring and evaluating the Directorate be placed with the National Police Service Commission in accordance with the recommendation made under s15 above.

That s.27(g) be redrafted as follows:

“(h) provide internal oversight of the Kenya Police Service in conjunction, and by cooperating, with the National Police Service Commission”.

Section 28. Functions of the Directorate

Subsection 26(c) specifies that one of the functions of the Directorate is to maintain law and order. Whilst it is agreed that the Directorate should cooperate with both the APS and KPS in helping to ensure the maintenance of law and order, their roles are distinct and such a function should never be a principle function of an investigative division.

Recommendation - That s.25(c) be deleted from the Bill.

Section 29. Funds of the Directorate

Section 29(1) directs where the funds of the Directorate come from. It is submitted that subsection (c) should be deleted and that the Directorate should never obtain funds from any source other than the government, including by way of donation. Further the section should specifically state that the Directorate is not able to take gifts or donations from any person.

To allow funds from other sources presents the danger of interested persons or corporations donating money to the Directorate, possibly in return for favourable treatment or decisions etc. The Directorate is an investigative body and should be immune from all such possibilities so as to maintain complete and proper independence in its operations and decision-making. The Directorate needs not only to be fair and operate fairly, but to be seen as such.

Recommendation - that s.29(1)(c) be deleted and s29(2) be amended to state that the Directorate shall not take any monies in the form of donations, gifts or take loans from any person or body except from Parliament. Contravention of such a section should be an offence.

Part VI - County Policing Authorities.

Section 33: County Policing Authorities

Under s33(9)(we note that there are two section 33 - we are referring to the second section 33), each County Policing Authority (CPA) has the following functions:

- a. Develop proposals on priorities, objectives and targets for police performance in the county;
- b. Monitor trends and patterns of the crime in the country including those that have a specific impact on women and children;
- c. Promote community policing initiatives in the county;
- d. Monitor progress and achievement of set targets;
- e. Provide financial oversight of the budget of the County police;
- f. Provide feedback on performance of the police service at the county level county police;
- g. Platform through which the public participate on all aspects to do with county policy and the national police service at county level;
- h. Facilitate public participation on county policing policy;
- i. Ensure policing accountability to the public;
- j. Receive reports from Community Policing Forums and Committees; and
- k. Ensure compliance with the national policing standards.

Despite outlining the above functions in the draft bill, there is no further explanation of how the priorities, objectives and targets for police performance will be determined by the CPA or incorporated into policing in the county.

If the county governments are going to have some relationship with policing, then a process needs to be explained properly so that it is clear how a CPA is going to monitor trends on crime, ensure police accountability and ensure compliance with national policing standards. These are important objectives, but without powers or a clear relationship with the Independent Police Oversight Authority and/or the Kenya National Human Rights and Equality Commission (e.g. to assist with providing statistics) - then the County Policing Authority will have trouble implementing its functions.

Additionally the budget of the County Police referred to in s33(1)(e) is not established in the draft bills at this stage. The Bill states that the Inspector-General will prepare budgetary estimates (s10(1)), and that each Deputy Inspector General for the KPS and APS respectively will prepare budgets (s15(c)) and APS (s22(c)). It is unclear if the budget of the County police referred to above is prepared by the Inspector-General or the Deputies.

Further, Subsection 33(9)(g) states that the CPA is a platform for the public to participate in county policy - this is too broad, and should be qualified to

state that it is a platform for the public to participate in county policing and security policy.

Under section 33(11), the CPA provides a quarterly report to the Inspector-General, Cabinet Secretary, county assembly and governor, detailing progress made, and impediments to progress, under each of the functions outlined above. The draft bill does not stipulate what the Inspector-General must do with the reports provided by the CPAs. There should be a requirement for the Inspector-General to take the reports into consideration and implement them where possible to ensure that the work of the CPA is of value.

Recommendations

There should be a further section that details how the CPA can meet its functions to monitor trends, promote community policing, facilitate public participation, ensure compliance with national policing standards. etc.

That the budget of the CPA is clearly established in the draft bill

Subsection 33(9)(g) should be reworded as *“platform through which the public participate on county policing and security policy”*

Section 33(11) or another part of the Bill establishes what the Inspector-General must do with the reports and recommendations of the CPA.

Part VII - General Functions, Powers, Obligations and Rights of Police Officers in the Service

Section 44. Power to enter premises and stop vehicles, etc, without warrant.

This section gives the police power to enter premises and vehicles without a warrant. This section also gives the police power to search vehicles (although the power to search without a warrant is also in section 47 - this is confusing).

In relation to searches without a warrant, it is submitted that the safeguards listed under subsection 44(5) be amended to ensure that power is not abused and the searches are not arbitrary. These safeguards would include that the search is conducted in the presence of independent witnesses; that the record of what is seized is counter-signed by both the independent witness and the occupier/owner of the premises; and that a copy of the record of the seizure is provided to the owner/occupier.

This would also ensure that evidence is not planted as frequently complained of. It would also protect the Police in that they can avoid future challenge to any evidence obtained in this manner.

Additionally, to ensure that the record itself is not tampered with, the record of the seizure along with the items seized shall be presented to a magistrate within a specified number of hours.

Recommendation - that subsection 44(5) be redrafted as follows:

(5) A police officer who exercises the powers under this Section shall -

- (a) Identify him or herself beforehand by showing his or her certificate of appointment;**
- (b) Record the action undertaken, including reasons why the action was undertaken, to whom, and if any independent persons were present;**
- (c) Make a record of anything seized, and that record shall be countersigned by both the independent witness (if any) and the owner/occupier of the premises or vehicle, and a copy of that record shall be provided to the owner/occupier.**
- (d) provide the report to his or her superior and bring before a magistrate within xx hours, the record of the seizure and the items seized (where practicable) or photos and descriptions of the items seized (where it is not practicable to bring such items to the Court)."**

Section 48 (and Schedule 6). Power to use firearms

Section 48 states the general principle of using non-violent means in the carrying out of Police functions. The section states that a police officer may use force and firearms in accordance with the Sixth Schedule.

CHRI highly commend the inclusion of Schedule 6 and note that the Schedule applies many of the UN established the Basic Principles on the Use of Force and Firearms ('Basic Principles'). CHRI suggest that the schedule be further considered to double-check that it complies with these fundamental Basic Principles.

In particular, it is submitted that 1(1) of the Sixth Schedule be slightly reworded to state that law enforcement officials may only use force when strictly necessary and only to the extent required to fulfil their lawful duty. Further it is submitted that 1(2) of the Sixth Schedule is confusing and needs to be redrafted to clarify that the use of force must be exceptional, proportional, necessary in the circumstances and limited to the prevention of crime or apprehension of suspects.

It is noted that the Basic Principles do not permit derogation from the framework for the use of force and firearms, including during times of political instability or periods of emergency.ⁱ

Apart from outlining in what circumstances force and firearms can be used, there should also be specific guidelines and safeguards in place to cover the practicalities of decision-making and appropriate procedures in the event that force or firearms are employed. The following must be covered in legislation:

- The decision to use firearms must be taken by a senior officer. The law should specify the particular rank, and should also take into account the fact that officers involved in making the decision of whether or not to issue firearms should have received a level of training which is sufficient to allow them to make a sound judgement on the matter.

Section 53. Protection from personal liability.

This section is, essentially, a ‘good faith’ clause, seeking to protect officers from liability if their actions are deemed to be in the performance or execution of their duties. Such a clause should not be used to provide a blanket protection to officers. Rather, it is submitted that it should specify that the action in question must be in pursuance of official discharge of duty.

Further, regardless of the existence of good faith or otherwise, any grievous bodily harm or death that results from police action should always and automatically be subject to inquiry by an independent authority (such as the Independent Police Oversight Authority).

Recommendation - That s.53 be redrafted as follows, including the additions in italics below:

“(a) No matter or thing done by a member of the Service, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, and in the course of the official discharge of duty, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.

“(b) Notwithstanding subsection (a), every instance whereby death, grievous bodily harm or sexual assault occurs at the hands of police, as a result of the actions of a police officer/s, or is alleged to have occurred at the hands of police or as a result of the actions of a police officer/s, is to be automatically and immediately subject to an inquiry by the Independent Police Oversight Authority.”

Section 58. Police officers prohibited from taking other employment.

It is noted that the National Police Service Commission Bill gives the Commission power to “approve applications for engagement by police officers in trade and other businesses” - s.10(1)(f) of that Bill (2010 version). As such, s.58 of this National Police Service Bill should specify, at the least, a procedure by which applications to engage in any trade or business outside of the police service are determined by the Commission.

It is submitted that it would be best if police were prohibited from engaging in any other trade or business at all.

Recommendation - That s.47 should be re-drafted as follows:

“47(1). No police officer other than a Reserve Police officer, shall engage in any trade, business or employment, outside the scope of his duties as an officer of the Service.”

Part VIII - Recruitment, Enlistment and Training of Police Officers

Section 60. Training police and curriculum

This section states that the Commission shall develop, oversee and review the training curriculum. CHRI submit that this section should be expanded upon to state that the training must include training on:

- Use of force and firearms
- Human Rights training
- Training in relation to dealing with vulnerable groups including women, children and asylum seekers/refugees/internally displaced peoples
- The roles of the Independent Policing Oversight Authority
- The role of the Kenya National Human Rights Commission

Recommendation - Section 60 (1)(a) be redrafted as follows:

(1) The Commission shall -

- (a) develop training policy and curriculum, including, but not limited to:***
- (i) use of force and firearms***
 - (ii) human rights training***
 - (iii) training to sensitize police officers to assist in dealing with women, children and asylum seekers, refugees and/or internally displaced peoples;***
 - (iv) the role of the Independent Policing Oversight Authority***
 - (v) the role of the Kenya National Human Rights Commission***

Part IX - Offences Against Discipline By Police Officers

Whilst this part largely speaks to internal oversight of the police, a subsection should be included in section 68 that states that nothing in this Part overrides the powers and functions of the Independent Policing Oversight Authority.

Recommendation - That s.68 include a sub-section that references the role of the IPOA as having independent oversight over police actions and functions, as follows:

“68...(10) Nothing in this Part overrides the powers and functions of the Independent Police Oversight Authority to oversee and monitor police actions, as set out in the Independent Police Oversight Authority Act.”

Section 52. Penalties for disciplinary offences.



Section 52(3) states that the procedure for all disciplinary proceedings under the Part shall be “in accordance with the Service internal disciplinary procedure as approved by the Commission and shall comply with Article 47 of the Constitution”. CHRI commend that this section refers to section 47 (fair administrative action) of the Constitution, however it is submitted that the Commission should publish publicly its procedures in accordance with Article 35 of the Constitution concerning access to information.

Recommendation - That there be provision made for the publication of these procedures and orders in the public domain, in accordance with the right to Access to Information.

Part XII - Provision for additional officers

Section 85. Additional officers for disturbed or dangerous areas.

Section 85(1) gives the Cabinet Secretary power to declare that any area of Kenya is in “a disturbed or dangerous state”. To designate an area as disturbed would in itself be an indication that regular policing - maintenance of law and order, and safety and security - has failed. That in itself would be a clear indication that there would have been significant deficiencies in the ordinary, every day policing plans of that area. This subsection does not set out the circumstances under which the secretary can declare an area disturbed, thus placing a very wide discretion in the hands of the Cabinet Secretary without grounds for any possible challenge to the exercise of the power.

Further, it does not provide a time limit for such a declaration to remain in force. If one goes to subsection 5, it simply states that each declaration notes how long it is to remain in force, and gives the Minister further power to extend or reduce the time period as he or she sees fit. This is simply not good enough - the legislation should provide consistency and transparency as to the maximum time allowed. Moreover, the Minister should not then be vested with the discretion to continue the notice period without any oversight. Rather, any extension should be subject to the approval of parliament.

Section 85(4) gives police officers power to conduct searches without warrants for firearms in declared areas where arms have been ordered to be surrendered. Such provisions serve to give police additional powers, without sufficient checks on those powers. If powers to search without warrant are to exist, then certain checks are required - as is stated elsewhere in this legislation, and discussed under Section 44, above.

In relation to this section generally, there are several important, overarching issues to be considered:

- Is it really needed at all? It must be borne in mind that the IG already has the power to deploy police wherever he or she sees fit, and in such numbers as are deemed necessary. It should be the case that such provisions are sufficient to deal with any dangerous or disturbed areas.
- It is possible that the section could be used to unfairly target a particular area or group of people. To help prevent such a thing, there must be a time limit for which an area can be declared disturbed or dangerous.

During that time, all efforts must be made by the police to restore normalcy. After the expiration of the time limit, any extension should have to be approved by Parliament.

Recommendation - That this section be deleted from the Bill.

Part XVI - Miscellaneous Provisions

Section 103. Police station to be lock-up.

This section states that detention shall comply with the requirements as set forth in the Fifth Schedule. It is submitted that in the Fifth Schedule there should be certain minimum standards set for police lock-ups. These standards must ensure the healthy and safety of confined persons, as well as full human rights protections and those protections enumerated in the Constitution. The UN Standard Minimum Rules for the Treatment of Prisoners, adopted in 1995, are instructive in this regard.

Recommendation - that the section include a provision that ensures that there be minimum standards in relation to the conditions of places of detention enumerated, as suggested below:

“The Minister must ensure that the minimum standards for police lock-ups are enumerated in the Regulations. The standards should take account of at least the following:

- ***the necessity for a Register to be kept of all persons in lock-up;***
- ***the necessity for separation of men, women and children;***
- ***the necessity for proper accommodation if persons are kept in lock-up overnight;***
- ***the necessity for clean and hygienic facilities;***
- ***the provision of food and drinking water;***
- ***the provision, or availability at request, of medical services;***
- ***allowing persons in lock-up to contact family, friends and legal counsel;***
- ***allowing legal counsel access to persons in lock-up.”***

Submission by:

Sarah Mount
Commonwealth Human Rights Initiative (CHRI)
B-117, 2nd Floor, Sarvodaya Enclave
New Delhi 110 017 India
Tel:91-11-43180200
Fax: 91-11-2686 4688
E-mail: info@humanrightsinitiative.org

ⁱ Article 8, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

