

**MEMORANDUM OF THE CIVIL SOCIETY WORKING GROUP ON POLICE
REFORMS TO THE COMMISSION FOR IMPLEMENTATION OF THE CONSTITUTION
ON THE PROPOSED AMENDMENTS TO THE NATIONAL POLICE SERVICE ACT AND
NATIONAL POLICE SERVICE COMMISSION ACT**

WHEREAS the *Commission for the Implementation of the Constitution* has requested for views from the public on the proposed legislative amendments to the above-mentioned statutes as set out in the “National Police Service Commission (Amendment) Bill, 2013” and “National Police Service Commission (Amendment) Bill, 2013”

THE CIVIL SOCIETY POLICE REFORMS WORKING GROUP being a national network supporting security sector and police reforms in particular:

AND CONSISTING of the following organizations:

1. Independent Medico-legal Unit (IMLU)
2. Legal Resources Foundation (LRF)
3. Kenya Human Rights Commission (KHRC)
4. Coalition on Violence against Women (COVAW)
5. Federation of Women Lawyers-Kenya (FIDA-K)
6. International Centre for Transitional Justice-Kenya (ICTJ-K)
7. Shield for Justice
8. International Commission of Jurists (ICJ-Kenya)
9. Rights Protection and Promotion Centre (RPP)
10. Kenya National Commission on Human Rights (KNCHR)
11. Centre for Minority Rights (CEMIRIDE)

HEREBY SUBMITS its views on the respective bills as follows:

1. The CSO Police Reforms Working Group contends that save for the proposed amendments in respect of typographical errors, the issues captured in the proposal for amendments to the National Police Service Act, 2011 and the National Police Service Commission Act, 2011 need not be contained in legislation but can be adequately addressed through regulations and guidelines developed and integrated by the National Police Service Commission, the Inspector General of the National Police Service, Cabinet Secretary responsible for police services and the National Security Council pursuant to section 124, 125, 126, 127 and 128 of the National Police Service Act, 2011.
2. The CSO Police Reforms Working Group contends that the Constitution already prescribes distinct functions and authority of the Inspector General, National Police Service Commission and Cabinet Secretary responsible for police services, which functions are reflected with greater clarity in the existing legislation targeted by the instant proposals for amendments which ought not to be derogated from in a manner inconsistent with the constitution. To this end, it is mischievous to camouflage intended changes in legislation as in purported attempts to distinguish the role of the aforementioned officers.
3. The CSO Police Reforms Working Group contends that differing opinions on matters of policy and operations within the National Police Service between the Chairperson of the National Police Service Commission and the Inspector General have been generated by misinterpretation of the law.
4. The CSO Police Reforms Working Group takes note with great concern of the emerging trend of politicization of the proposed amendments captured in the media, and in particular, the positions taken in public by members of parliament aligned to the CORD Alliance¹ and the Jubilee Alliance² with generalized perceptions and vows to lobby members

¹<http://www.citizennews.co.ke/news/2012/local/item/10683-government-accused-of-scheming-to-amend-the-national-police-service-act>

²<http://www.thepeople.co.ke/4127/duale-to-lobby-mps-to-amend-national-police-service-act-2011/>

of parliament to vote in a particular manner in relation to the proposed amendment thereby endangering objective analysis of the bills in parliament in a prospective contest for display of political muscle between the sworn rivals. The CIC is urged to safeguard the authority of the constitution by eliminating any unnecessary amendments by the proposed bills that may ultimately be defaced in a raging battle for political superiority thereby eroding the integrity of the spirit of constitutionalism.

ALTERNATIVELY RECOGNIZING that the CIC or the Attorney General may hold a position different from the one articulated above and forward the bills to parliament without significant changes, the CSO Police Reforms Working Group proposes that:

5. Any amendment proposed in respect to the two statutes targeted should be made wholly in consistency with the Constitution.
6. Recognizing that the initial account of proposals for holistic reform of the police is traceable to the recommendations contained in the Report of the Task force on Police Reforms popularly referred to as the *Ransley Report* compiled after wide consultations with members of the public, police officers and experts and that the said recommendations are largely reflected in the Constitution, the CSO Police Reforms Working Group contends that in consideration of the amendments to both statutes, the CIC should be guided by the spirit of the aforesaid recommendations provided the same are not inconsistent with the Constitution.
7. The Civil Society Police Reforms Working Group maintains that division of functions among the Inspector General, the National Police Service Commission and the Cabinet Secretary is quite clear in the Constitution. Thus, the proposed amendments should uphold the **functional independence** of these institutions and offices.

8. The Civil Society Police Reforms Working Group advocates for the development of regulations and guidelines by the National Police Service Commission on the manner in which delegated authority derived from Article 246(3) will be exercised by the Inspector General and other designated members of the National Police Service.
9. The Civil Society Police Reforms Working Group, whilst recognizing the support required from the Cabinet Secretary and the National Security Council, maintains that the involvement of the two institutions in police services should be restricted to policy matters as envisaged by the Constitution and elaborated in the two principal Acts targeted by the amendments.
10. The Civil Society Police Reforms Working Group contends that the proposed amendments should ensure that the authority of the Inspector General in operational matters over all the officers from all units within the National Police Service as envisaged in Article 245(2)(b) remains unfettered.
11. The Civil Society Police Reforms Working Group recognizes the need for intentional promotion of affirmative action in unqualified and unadulterated terms in all human resource considerations and practices to promote gender parity and eliminate discrimination within the National Police Service.
12. The Civil Society Police Reforms Working Group regrettably notes with great concern and distaste, the attempt by the proposed amendments to introduce authority by police officers to use firearms in a manner that exceeds the limits prescribed under international standards as set out in the *UN Basic Principles on the Use of Force and Firearms* without due regard to the numerous and avoidable cases of extra-judicial or arbitrary executions and grievous bodily harm occasioned by police officers documented by members of the working group.

13. Without prejudice to the foregoing, the Civil Society Police Reforms Working Group, wholly relies on its analysis of the proposed amendments set out in ANNEX 1 and 2 herein.

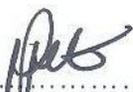
REASONS WHEREFORE the authorized representatives of organizations herein below constituting CSO Police Reforms Working Group have executed and tabled this memorandum on amendments relating to the two bills mentioned hereinabove.

DATED THIS 4TH DAY OF JULY 2013

1. Independent Medico-legal Unit (IMLU)
2. Legal Resources Foundation(LRF)
3. Kenya Human Rights Commission (KHRC)
4. Coalition on Violence against Women (COVAW)
5. Federation of Women Lawyers-Kenya (FIDA-K)
6. International Centre for Transitional Justice-Kenya (ICTJ-K)
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Signed:

Peter Kiama



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Executive Director (Independent Medico-legal Unit)

On behalf of the Police Reforms Working Group

ANNEX 1**Analysis of the Proposed Amendments by the National Police Service (Amendment) Bill, 2013**

1. *Clause 2* of the National Police Service (Amendment) Bill, 2013 seeks to specify Articles of the Constitution based on which the Principal Act is anchored. This a worthwhile legal statement which not only re-emphasizes the authority of the Constitution but also clarifies the purpose of the respective legislation on policing and ensures effective monitoring of specified aspects of implementation thereby eliminating ambiguity.
2. The definitions introduced under *Clause 3* are more appropriate than the ones contained in the Principal Act given that they derive their legal identity from specific reference to the respective provisions of the Constitution.
3. *Clause 4* is merely intended to confine the mandate of the National Police Service as per the Constitution. There is no adverse effect in deletion of the words “Article 247”.
4. *Clause 5* seemingly harmonizes the administrative ranks of both the Kenya Police Service and the Administration Police Service and promotes the message of a unified police service with comparably equitable ranking of officers. However, the introduction of the new rank of Senior Assistant Inspector General is without any arguable rationale. This position was not envisaged in the proposed ranks in the *Ransley Report*.
5. *Clause 6* is appropriate in eliminating discrimination based on gender and ensuring that affirmative action in this respect is intentional. This is a progressive amendment that promotes the implementation of Article 27 of the Constitution.
6. *Clause 7* is an amendment of a typographical error.

7. The proposed amendment under *Clause 8(a)* is bound to generate conflict between the role of the National Police Service Commission in Article 246(3) of the Constitution and that of the Inspector General on disciplinary matters. Whilst recognizing the practicality of the need for day-to-day exercise of authority by the Inspector General to discipline members of the service or delegate the same as appropriate, it is proposed that the amendments set out in this Clause be qualified by a requirement that such disciplinary authority be exercised subject to guidelines and regulations issued by the National Police Service Commission.
8. *Clause 8(b)* is inconsistent with Article 246(3) of the Constitution. The Inspector General should instead be required to submit proposals to the National Service Commission for transfers, discipline and promotion for **approval**. Provision should be made for the development of appropriate guidelines and regulations for fast-track of deployment in emergency responses as those witnessed in the adverse security situations in the year 2012 and 2013. It should be noted that the Ransley Report documented the complaints by junior officers on the manner in which such powers were exercised arbitrarily over them without oversight.³
9. The deletion of “County Policing Authorities” by the amendment envisaged in *Clause 9* is appropriate because recommendations on deployment to them are mere administrative directives, issued upon approval by the National Police Service Commission, by the Inspector General to whom the said authorities are subject; hence, reference to them need not appear in legislation.
10. The amendment envisaged in *Clause 10* may be appropriate in promoting consultations within the National Police Service
11. *Clause 11* is appropriate to the extent that it promotes consultation with the senior most officers of the two wings of the service, Kenya Police Service and Administration Police

³ Report of the National Task Force on Police Reforms, p.11

Service, within the National Police Service on matters relating to the command structure and system of service instead of imposing changes over them. The heads of the two branches of the service are best placed in advising the Inspector General on the appropriate command structure, and their direct involvement must be safeguarded. This can also be cured by regulations.

12. Since the Constitution envisages the Cabinet Secretary responsible for police services' role as policy guidance, *Clause 12* may be appropriate in confining the holder of this office to this role. It is more appropriate that even in an interim period the National Police Service be led by a member of the service. Further, the technical nature of certain decisions at the level of the Inspector General inevitably makes it more appropriate to have one of the Deputy Inspectors-General acting instead of the Cabinet Secretary given that the latter may not have the requisite technical expertise to act.
13. *Clause 13* is appropriate in ensuring continuity within the context of institutional memory at the senior level of the police service when an Inspector General ceases to hold office and a new one is appointed. If all the three top officers of the National Police Service ceased to hold office at almost the same time, this would inevitably affect the smooth operations of the service.
14. *Clause 14* is appropriate because the position of Prime Minister no longer exists in government.
15. The wording of *Clause 15* is potentially inconsistent with Article 246(3) of the Constitution and may lead to usurping of the powers of the National Police Service Commission because they relate to human resource functions conferred on the latter. It is more appropriate for the Commission to determine whether or not it is necessary to amend the 1st Schedule and to make that recommendation to the Cabinet Secretary. Naturally, the Inspector General should table such requests to the National Police Service Commission for deliberations and approval.

16. Clause 16 is appropriate to the extent that it harmonizes the administrative ranks of the Administration Police Service with that of the Kenya Police Service and promotes the message of a unified police service with comparably equitable ranking of officers. However, the introduction of the new rank of Senior Assistant Inspector General is without any arguable rationale. This position was not envisaged in the proposed ranks in the Ransley Report. The only reason one can deduce for this proposal is the retention of the status quo, that will greatly impede the installation of champions of change at the top echelon of the force.
17. Clause 17 is appropriate to the extent that it introduces functions of management that would naturally be expected of the Deputy Inspector General of the Kenya Police Service. Further, a typographical error in the opening statement of section 26 should be corrected by inserting the word “Service” after “of the Administration Police”.
18. Clause 18 is appropriate in recognizing the representative of the National Intelligence Service as an independent member of the County Policing Authority who is appointed by the Director of the National Intelligence Service and not the Inspector General of the national Police Service.
19. Clause 19 is appropriate as an amendment of a typographical error.
20. Clause 20 is necessary in protecting persons from arbitrary arrest by police officers.
21. *Clause 21* should be modified to require recognition of the associations only by the National Police Service Commission, and not necessarily the Inspector General and the Cabinet Secretary thereby eliminating intimidation and undue restrictions by the latter two. It is also more appropriate if the existence and validity of such associations is determined by one authority rather than all the three authorities mentioned hereinabove. Given that these associations do not constitute units of the National Police Service, they should be treated as

independent initiatives by members of the service and have a right to recognition by the Cabinet Secretary and the Inspector General provided that they do not exist for purposes contrary to the law.

22. *Clause 22* is only acceptable if the National Police Service Commission develops guidelines to define the exercise of such oversight over the Internal Affairs Unit on matters of discipline, which guidelines should define time limits for transmission to the Commission by the Inspector General of the matters forwarded to him by the Internal Affairs Unit and making mandatory for the Inspector General to comply with the same. There should be provision for direct transmission of matters to the Commission upon the expiry of reasonable time limit within which the same has been forwarded to him for action by the Internal Affairs Unit. Further, provision should be made for direct transmission of cases in which the Inspector General is adversely mentioned.
23. *Clause 23* is appropriate as a better rephrasing of section 88 of the National Police service Act.
24. The inclusion of additional penalties for offences against discipline contained in *Clause 24* is appropriate to the extent that these are effective penal measures in curbing indiscipline within the force and are consistent with other written laws. Further, the change of “internal disciplinary procedures” to “standing orders” in section 89 of the principal Act is appropriate to the extent that the latter is the correct legal description of the disciplinary procedures. The intention to guarantee the right of appeal of members of the service to the National Police Service Commission is an appropriate amendment.
25. *Clause 25* is a mere amendment of a typographical error
26. *Clause 26* should be qualified by a requirement for approval by the Cabinet Secretary and ensuring compliance with international standards on the use of firearms as set out in the *UN Basic Principles for Use of Force and Firearms*.

27. *Clause 27(a)* should be qualified to require the National Security Council to make its determination in consultation with the Commission given that the latter has no seat in the council unlike the Inspector General.
28. *Clause 27(b)* is appropriate as a measure of enhancing capacity of Police Reserve Officers to carry out their functions effectively.
29. The requirement under *Clause 28* for consultation with the National Security Council in deployment in the proposed section 110B is inappropriate. This role should instead be exercised in consultation with the Commission. The National Security Council should only give policy guidance on such matters.
30. *Clause 29* is best retained as worded in the principal Act to promote clear distinction in law of the powers of the Commission and the Inspector General as set out in Article 246(3) of the Constitution. Naturally, this authority for recruitment of police reserve officers may be delegated to the Inspector General.
31. It is doubtful whether *Clause 30* adds any value to the National Police Service given that there is no clear rationale on the eligibility for re-appointment of a former police reserve officer after two years.
32. *Clause 31* is appropriate as a better rephrasing of section 114 of the principal Act.
33. The introduction of the new rank of Senior Assistant Inspector General through the revised First Schedule under *Clause 32* is without any arguable rationale. This position was not envisaged in the proposed ranks in the *Ransley Report*.
34. The amendment envisaged in *Clause 33* is inappropriate to the extent mentioned in paragraph 34 hereinabove.

35. The introduction of *Clause 34* is inappropriate on the basis that it contravenes the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.⁴ Further, the evidence gathered by members of the working group over several years indicates that the arbitrary and reckless use of firearms has caused numerous avoidable deaths and grievous bodily harm in circumstances that constitute those permitted by the proposals in *Clause 34*.
36. The proposed amendment in *Clause 35* under the Eight Schedule (hh) potentially violates unfettered access to health care by police officers. Historically, medical practitioners been complicit to acts of torture in instances of dual loyalty, a vice that the proposed amendment may permit.

⁴<http://www1.umn.edu/humanrts/instate/i2bpuff.htm>

ANNEX 2

Analysis of the Proposed Amendments by the National Police Service Commission (Amendment) Bill, 2013

1. *Clause 2 and 3* in their entirety is geared towards restricting the role of the National Police Service Commission to the scope of authority envisaged in Article 246(3) of the Constitution thereby limiting interference by the Commission in operational issues of the National Police Service which fall within the authority of the Inspector General.
2. *Clause 2(a)* also seeks to make express the requirement for consultation on human resource matters set out therein to ensure the Commission involves the Inspector General in its review of policies and standards relating to the service. This amendment may be inappropriate to the extent that the Inspector General is already an equal member of the National Police Service Commission.
3. *Clause 2(f)* is appropriate to the extent that it elaborates the meaning of disciplinary control as provided for under Article 246(3) of the Constitution. However, it would be even more appropriate if the wording in the intended section 10(4) of the principal Act is changed from “shall be limited to” to “**shall include**”. This ensures that the provision does not become an impediment to implementation of connected issues requiring the intervention by the National Police Service Commission.
4. The words “and discipline” should be deleted from the proposed section 10(5) to avoid confusion of roles herein. In the alternative, the phrase “command and discipline” should be defined in the interpretation section of the principal Act and that of the National Police Service Act, 2011 for purposes of clarity and for avoidance of doubt.