

**KNCHR ADVISORY BRIEF ON NATIONAL POLICE SERVICE AMMENDMENT BILL
2013 AND THE NATIONAL POLICE SERVICE COMMISSION AMMENDMENT BILL
2013**



Kenya National Commission on Human Rights

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Introduction

The Kenya National Commission on Human Rights (KNCHR) submits this advisory brief pursuant to its constitutional function under Article 59(d) which mandates the Commission to monitor investigate and report on the observance of the human rights in all spheres of life in the Republic including the observance by national security organs. The KNCHR has since inception been at the forefront in the process of transforming the policing organs from regime policing to democratic policing which is more transparent, responsive and accountable to the people of Kenya.

With greater entrenchment of the democratic governance the world over, a lot of consideration has gone into how all public institutions, including the police service, can become more accountable to the citizens on whose behalf they operate. Since democracy means governance that is accountable to the people, accountable policing is synonymous with democratic policing. The above ideals of democratic policing thus ought to underpin any legislation that govern policing work in the country as well as any amendments that may accompany these legislations.

In the past, the security agencies have been accused of serious violation of human rights, corruption, abuse of power, nepotism among other ills. The promulgation of the Constitution in August 2010 established a new order with restructured institutions that would enhance principles of democratic policing and eradicate these ills. These institutions include the Independent office of the Inspector General, the National Police Service, the National Police Service Commission, the Independent Policing Oversight Authority and the Internal Affairs Unit. It is imperative that these institutions are at all times enabled to perform their functions.

The National Police Service Amendment Bill 2013 and the National Police Service Commission Amendment Bill 2013 seeks to address the apparent clash of mandate between the Independent office of the Inspector General and the National Police Service Commission as well as increase the powers of the Inspector General who has indicated repeatedly that his hands are tied in the command of the Service.

The following are the KNCHR submissions on the Proposed Amendments.

Proposed Amendments that are constitutional and are in conflict with the Spirit of Reforms in the Security Sector (The National Police Service Amendment Bill 2013)

Principal Act	Amendment	Retrogressive Aspect
Section 8 – the Service shall be under the overall and independent command of the	Notwithstanding the provision of any written law, independent command of the	This particular proposal is an affront to the rationale of reforms which was to avoid

<p>Inspector General appointed in accordance with article 245 of the Constitution and the provisions of this Act.</p>	<p>Inspector General in relation to the Service envisioned in Article 245(2)(b) and section 8 of the Act means that;</p> <p>(a) The Inspector General shall be responsible for all matters auxiliary to and touching on the command and discipline of the Service.</p> <p>(b) Promotion of, transfer of and disciplinary action taken on a member of the Service on matters relating to article 246(3) of the Constitution, shall be on the recommendation and upon consultation with the Inspector General</p>	<p>the concentration of powers in the institutional head of the National Police Service. The possibility of abuse of these powers by the Predecessor, Commissioner of Police, informed the creation of the National Police Service Commission with powers and functions under Article 246 of the Constitution. Article 246(3)(b) explicitly states that the National Police Service shall <i>inter alia</i> exercise disciplinary control over and remove persons holding or acting in offices within the service. The Inspector General, together with his two deputies are members of the National Police Service Commission. It is thus mischievous that consultations have to be done with a fellow member of the Commission who holds the same status as other Commissioners.</p> <p>Independent command is not about hiring and firing but about implementing the functions envisioned in Article 10 of the Principal Act and management of the National Police Service.</p> <p>This amendment can only be achieved by amending the</p>
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		<p>Constitution to permanently transfer these powers from the National Police Service Commission to the office of the Inspector General. We reiterate that the amendment is not desirable.</p>
<p>Section 22 – The cabinet Secretary may on the advice of the Commission from time to time by order published in the Gazette, amend the Schedule.</p>	<p>The Cabinet Secretary may on the advice of the Inspector General and in consultation with the Commission by order published in the Gazette, amend the First Schedule.</p>	<p>The ideals of democratic policing demands participation as a key tenet in policing work. This participation can only be achieved when decision making on reforms is carried out by an institution not by an individual.</p> <p>Given that the Inspector General is a member of the National Police Service Commission it is clear that the Commission shall have the benefit of his unique experience in informing any decisions or recommendations that they may make.</p> <p>It is not desirable to create a situation where the Inspector General acts on an independent limb and in opposition to the Commission. This requirement for the Commission to consult the Inspector General has the effect of not only removing</p>

		<p>the Inspector General from the Commission but may also be understood to elevate him above the other members of the Commission. This section should thus not be amended and should stay as in the Principal Act where the Commission will advise the Cabinet Secretary directly and not through the Inspector General</p>
<p>Section 89 – A police officer who commits an offence against discipline is liable to be punished;</p>	<p>Inserting new paragraphs that include;</p> <ul style="list-style-type: none"> (a) Confinement to barracks or police lines. (b) Reduction of salary by not more than a third of the basic salary for a period not exceeding three months. (c) A fine not exceeding a third of the basic salary. 	<p>The introduced discipline measures are retrogressive and go against fundamental rights and freedoms.</p> <p>Confinement to barracks is akin to torture, cruel, inhuman and degrading treatment and slavery and servitude that is prohibited under article 25 of the Constitution of Kenya.</p> <p>The standard practice in labor relations is that salary reduction only occurs when an individual is suspended and undergoing investigations and not as a disciplinary measure on its own as well as imposition of In general, the officer’s salary should not be attached as a disciplinary measure as this will be opened to abuse and the</p>

		<p>money attached will have no mechanism of accountability.</p> <p>These proposed amendments should thus be rejected.</p>
<p>Sixth Schedule C 2 (1) – Refusing to carry out orders that include unlawful use of force should not be penalized and should not be a disciplinary offence</p>	<p>Deleting the paragraph 2 (1) then DO NOT DELETE again.</p>	<p>It is not clear whether it is intended to Amend this particular Section by deleting the entire paragraph. As there are notes that direct that it should not be deleted. The clause is progressive and will serve to promote discipline within the service</p> <p>That section should not be DELETED and should stay as in the Principal Act.</p>
<p>Sixth Schedule B – Firearms may only be when less extreme means are inadequate and for the following purposes;</p> <p>(a) Saving or protecting the life of the officer or other person and</p> <p>(b) In self defense or in defense of other person against imminent threat of life or serious injury.</p>	<p>Inserting the following new sub – paragraphs;</p> <p>(a) Protection of life and property</p> <p>(b) Preventing a person charged with felony from escaping lawful custody.</p> <p>(c) Preventing a person who attempts to rescue or rescues a person a person charged with a felony from escaping lawful custody.</p>	<p>These amendments on the use of arms are mischievous and likely to take the country back to the era of extra – judicial executions by members of the Police. Investigations carried out by KNCHR on extra judicial killings had pointed to a trend where victims were shot dead at close range by police officers in the pretext of victims escaping from lawful custody.</p> <p>Principles of proportionality and necessity govern the use of force in international practice and non – violent means is always the first</p>

		<p>option when dealing with a problem.</p> <p>As is expressly indicated in the Principal Act, firearms can only be used when strictly necessary and in proportion with the objective being pursued in the protection of life and self defense.</p> <p>Police as law enforcement agencies have other tools of trade as well as the guidelines through which the firearms can be used in line with the International Human Rights Standards and framework. In undertaking their work and in guiding this amendment, the following should be the principles that should be applied;</p> <ul style="list-style-type: none"> (a) Minimum use of force (b) Use of force proportional to the threat (c) Minimum collateral damage <p>In line with the above we propose that this Part should not be amended as proposed.</p>
<p>Eight Schedule – Offences against discipline</p>	<p>In the new introduced offences against discipline; add the following as an</p>	<p>The female officers have time and again complained about sexual harassment from either colleagues or seniors. It</p>

	offence; (nn) Sexual harassment	is imperative that this becomes an offence so that it can be punished within the context of policing work on a daily basis.
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CASE STUDY; THE JUDICIAL SERVICE COMMISSION (THE NATIONAL POLICE SERVICE COMMISSION AMMENDMENT BILL 2013)

The Judicial Service Commission is one of the Commissions created under Chapter Fifteen of the Constitution and has the same arrangement and functions as the National Police Service Commission. The Judicial Service Commission manages the judiciary with the Chief Justice as the Chairperson and a Commissioner while the National Police Service Commission has the Inspector General as a member of the Commission together with his deputies.

The office of the Chief Justice and the Judicial Service Commission are created by a single Act, the Judicial Service Act No. 1 of 2011. The Judicial Service Commission has 12 Commissioners with the Chief Justice as the Chairperson and the Chief Registrar of the Judiciary as the Secretary to the Commissioners. However, these two serve on the same status as other ten Commissioners and thus have the same powers that include voting and quorums in attending meetings. This arrangement has worked well for the Judiciary without the hitches being witnessed in the National Police Service Commission and the Inspector General.

However, the Office of the Inspector General is created by the National Police Service Act while that of the National Police Service Commission is created by the National Police Service Commission Act. The Inspector General and his two deputies attend the meetings of the National Police Service Commission but as ex – officio members who do not have voting powers as well as do not constitute a quorum. This means that their presence in the meetings is reduced to mere observers, listeners and taking decisions for implementation.

To cure the problem of consultation that has been manifested in the amendments, the amendment introduced in the National Police Service Commission Act, Second Schedule, Section 3 should make the Inspector General and his two deputies not ex – officio members of the Commission but full members that constitute a quorum and has voting powers. The amendment should too make it mandatory that all the meetings shall not have quorum with the absence of either the Inspector General or any of his two deputies. This shall then make the office of the Inspector General full Commissioners thus cure the problem of consultation with the other Commissioners but now act as collegiate body.

The Proposed amendments to the National Police Service Act are in order for the proposal to amend Section 10 by adding sub Section 5. This clearly contravenes the provisions of the Constitution as stated above.